Supreme Court, U.S.
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No. 04-____

IN THE
Supreme Court of the United States

REBECCA CRYSTIAN, et al.,

Petitioners,

v.

TOWER LOAN OF MISSISSIPPI INC, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 12, 2004

QUESTION PRESENTED

In a class action settlement purporting to resolve the money damages claims of absent members, did the denial of petitioners' attempts to opt out violate Federal Rule of Civil Procedure 23 or the Due Process Clause of the Fifth Amendment?

PARTIES

Petitioners Rebecca Crystian, et al., are approximately 835 individuals who were among approximately 1200 members of the plaintiff class who appeared in the district court and were denied the right to opt out of this class action by that court. All petitioners appeared as appellants in the court of appeals below. Each petitioner is listed by name immediately after the list of respondents.

The named respondent, Tower Loan of Mississippi Inc., appeared as defendant-appellee in the court of appeals below. The other defendants-appellees in the court of appeals (and respondents in this Court) are American Federated Insurance Company, American Federated Life Insurance Company, and First Tower Loan Inc. Respondents also include Claudia Smith and Wilbert Walker, as representatives of a plaintiff class of other similarly-situated individuals. That plaintiff class appeared as appellees in the court of appeals below.

In addition to named petitioner Rebecca Crystian, the petitioners are: Martha Shaffer, Pam White, Felicia Goodwin, Gwendolyn Bowden, Johnnie Bowden, Susie Brister, Douglas Brown, Rosie Brown, Carrie Lee Davis, Alfred Levi, Betty Reed, Derrick Edmond, Cornelius Walker, Annette Brown, Timothy Puckett, Angela Puckett, Doris Coleman, Perry Harris, Sandra Harris, Dora Ratliff, Linda Westbrook Smith, Donnie Smith, Dorothy L. Ginn, Jewell E. Ginn, Alean Lampton, Flossie Riley, Emma Smith, Maxine Stewart, Andrea Mitchell, the surviving heirs of Elijah Ratcliff, Sr., Kathy White, Shirley Causey, Elijah Ratcliff, Jr., Pearlie Ransom, Roy Ransom, Mary Benson, Harold Barkley (Chapter 13 Trustee for the Southern District of Mississippi), Locke Barkley (Chapter 13 Trustee for the Northern District), Randolph Sullivan, Patricia A. Black, Willie J. Myers, Homer Smith, Linda Smith, Queen E. Mixon,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Rebecca Crystian, et al., seek a writ of certiorari to review a ruling that conflicts with the decisions of other courts of appeals and of this Court. Approximately 1,200 class members, including the approximately 835 who are petitioners here, sought to opt out of a class action settlement with respondents Tower Loan of Mississippi, et al., and pursue their own money damages claims. Neither the class certification nor the settlement permitted opt-outs, and the court of appeals determined that neither Federal Rule of Civil Procedure 23 nor the Due Process Clause provided a right to opt out. The decision below thus bound dissenting class members, against their will, to a settlement that extinguished their claims to potentially thousands of dollars in damages in exchange for relief averaging under $65 per class member, while providing hundreds of thousands of dollars in fees for class counsel.

This Court has expressly stated that Rule 23 and the Due Process Clause may require an opt-out right for damages claims. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). It has twice granted certiorari to determine the due process question, but it dismissed the writ as improvidently granted each time. *See id.*; *Adams v. Robertson*, 520 U.S. 83 (1997). In one instance, the Court dismissed because the case's posture did not permit deciding the Rule 23 question before reaching the constitutional question. *See Ticor*, 511 U.S. 117. In the other, it dismissed because the constitutional question had not been properly presented to the court to which the petitioners sought certiorari. *See Adams*, 520 U.S. 83. This petition presents none of the problems that led the Court to dismiss the writ in *Ticor* and *Adams*. It therefore provides the opportunity to resolve a long-standing conflict among the courts of appeals on whether Rule 23 provides damages claimants the right to opt out of class actions and, if not, whether the Due Process Clause guarantees that right.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unofficially reported at 91 Fed. Appx. 952 and is reproduced in the appendix at Pet. App. 1a. The opinion of the United States District Court for the Southern District of Mississippi is reported at 216 F.R.D. 338 (2003) and is reproduced in the appendix at Pet. App. 9a.

JURISDICTION

The court of appeals entered judgment on March 16, 2004. Pet. App. 1a. Petitioners filed a timely petition for rehearing *en banc* on March 30, 2004, which the court of appeals denied on July 14, 2004. Pet. App. 109a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE AND CONSTITUTIONAL PROVISION INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at Pet. App. 111a. The Due Process Clause of the Fifth Amendment provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case involves the settlement of a class action brought on behalf of people who borrowed from respondent Tower Loan of Mississippi between February 15, 1993, and September 1, 2001. The class complaint alleged a variety of predatory lending practices. Under the settlement, the class receives a total of $6.62 million (an average of $62.27 per class member), class counsel will receive up to $900,000 in attorneys' fees, and Tower must alter its lending practices for five years, after which it is free to resume the very conduct challenged in this litigation. Over 1,200 class members—approximately 835 of whom are petitioners here—objected to the settlement and attempted to opt out,

believing they could do better pursuing their own claims. Although the action asserted routine consumer claims for monetary damages, the court of appeals affirmed certification of a mandatory, non-opt-out class under Federal Rule of Civil Procedure 23(b)(1)(A). As a result, class members who wished to pursue their claims independently were prohibited from doing so. This case presents the question whether it was lawful to deny those class members the right to opt out.

1. The Nature Of The Predatory Lending Allegations And The Remedies For Similar Violations Obtained By Other Plaintiffs In Individual Actions

Plaintiffs alleged that Tower engaged in a variety of predatory lending practices in violation of Mississippi and federal law. Specifically, they claimed that Tower employed a practice known in the industry as "insurance packing," which consists of using fraudulent and misleading disclosures and coercive marketing practices to induce borrowers to purchase insurance in conjunction with their loans at unfavorable rates and under unlawful conditions. Some plaintiffs were induced to buy personal property insurance they claim was worthless because their property was already fully insured. Others were charged for insurance without being told it was optional, or were charged premiums beyond the terms of their loans. Still others were fraudulently induced to refinance their loans, taking on additional interest payments and insurance premiums—a tactic known as "flipping" that almost invariably harms borrowers. These practices imposed unlawful premiums and in some cases destroyed borrowers' credit ratings and led to repossessions and foreclosures. Plaintiffs principally sought monetary relief in the form of compensatory and punitive damages.

Several attorneys have sworn in uncontested affidavits that past plaintiffs with similar claims have won, or settled for, substantial damages. In one action against another Mississippi

loan company, 23 plaintiffs won highly individualized damages judgments ranging from $5,000 to $250,000. *See* Fifth Circuit Record (hereafter "R.") 1748-52, 1800-01; *see also* R. 1095 (affidavit of attorney who litigated thousands of cases involving issues here stating that "all the individual settlements were far in excess of those contemplated by the Tower Class Settlement"); R. 2008 (affidavit of attorney who represented six clients in three cases involving claims of insurance packing and flipping stating that most settled prior to trial for significantly more than $100). Here, class counsel has conceded that class members' circumstances vary widely and that between 1,000 and 1,500 class members could likely win substantial damages awards if permitted to pursue their own state-court actions. Abernathy Testimony, R. vol. XI 37-38, 46-47.

2. Procedural History

Petitioner Crystian, hundreds of other petitioners, and many other plaintiffs sued Tower and its affiliates in Mississippi state courts in 1998. R. 1467. Their complaints contained numerous state-law counts, including breach of fiduciary duty, breach of the covenants of good faith and fair dealing, fraudulent misrepresentation or omission, negligent misrepresentation or omission, civil conspiracy, restitution, unjust enrichment, fraud, and usury. *See, e.g.*, Complaint ¶¶ 28-93, *Barnes v. First Tower Loan, Inc.*, No. 98-0022 (Cir. Ct. Jefferson Cty., Miss. filed Feb. 17, 1998), R. 1451-64. The complaints primarily sought compensatory and punitive damages and did not seek class certification. *Id.* ¶ 101, R. 1467.

Separately from petitioners, plaintiff Bryant Jones had previously sued Tower in United States District Court for the Southern District of Mississippi, landing before Judge Charles Pickering. *See Bryant Jones, et al. v. Tower Loan*, No. 2:96cv63PG (S.D. Miss.). Jones asserted state-law claims similar to petitioners' and added separate counts alleging

violations of several federal statutes, including the Truth in Lending Act and the Fair Debt Collection Practices Act. R. 22-24, 27. He also sought class certification under Federal Rules of Civil Procedure 23(b)(1), (b)(2), and (b)(3). Faced with hundreds of similar state-court claims and one putative federal class action, Tower supported certification, but only for a mandatory class under (b)(1) and (b)(2) that would sweep in all other claims pending against it. However, in February 1998, Judge Pickering rejected mandatory class certification, specifically commenting that class members must be provided the right to opt out. Oral Bench Opinion, R. 1101-04 (Feb. 5, 1998).

With the first mandatory class defunct, new counsel took the same claims to another judge in the same federal district court (Judge David Bramlette), resulting in the present action. *See* Complaint, R. 1. The complaint asserted federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367. The first eighteen counts of the class complaint focus entirely on obtaining money damages from defendants. The complaint seeks "actual and compensatory damages," Second Amended Complaint ¶ 121(b), R. 513, under federal anti-trust law, the Truth in Lending Act, the Fair Debt Collection Practices Act, and other statutes, *id.* ¶ 121(c), R. 513, "punitive damages in a fair and reasonable amount," *id.* ¶ 121(d), R. 514, restitution and/or disgorgement, *id.* ¶ 121(e), R. 514, and any monetary relief that might be available under Mississippi Code Annotated § 63-19-55. *Id.* ¶ 121(f), R. 514. After the foregoing requests for comprehensive compensatory, punitive, and other monetary relief, the nineteenth count of the complaint includes one boilerplate request for injunctive relief. *Id.* ¶ 121(g), R.514.

Tower again supported mandatory class certification, and Judge Bramlette agreed. On September 9, 1998, he certified the same claims and same class that Judge Pickering

had just rejected—a mandatory class under Rules 23(b)(1)(A), (b)(1)(B), and (b)(2)—and enjoined all pending and future state-court actions against Tower. R. 191. Thus, hundreds of class members who had not yet sued Tower individually, including hundreds of the petitioners in this Court, were enjoined from filing purely on the basis of speculation that their eventual claims would be appropriate for mandatory class treatment.

3. Terms Of The Settlement

In the spring of 2002, class counsel and counsel for Tower agreed to settle the case, and, on April 16, 2002, the district court preliminarily approved the settlement. The agreement divides $6.62 million among approximately 100,000 class members. *See* Settlement Agreement at 12-13, R. 979. The $6.62 million comprises "compensatory" and "punitive" damages funds of $2.23 and $4.39 million, respectively. Approximately 67,000 principal borrowers will receive $27.50 in compensatory damages and $41.25 in punitive damages, while 28,000 co-obligors will receive $13.75 and $20.62, respectively. R. 979-80 & n.2. Repeat borrowers will receive an extra $18.00 in punitive damages. *Id.* Thus, the maximum amount that any class member will receive—regardless of the number of loans, the type or amount of insurance involved, the amount of premiums paid, the conduct of Tower and its agents in individual instances, the class members' knowledge of whether the loans included insurance, and any resulting tarnished credit ratings, foreclosures, or repossessions—is $86.75, the amount available to repeat, principal borrowers. The agreement also restricts Tower's lending practices for five years, a benefit only to those plaintiffs who choose to borrow from Tower again in that period.

Critically, the settlement prevents class members from opting out and extinguishes all claims they may have against Tower regarding any aspect of its loan practices, including the

damages claims in petitioners' state-court suits.

4. Decisions Below

More than 1,200 class members objected to the settlement, including nearly every person with a pending state-court action. Petitioners objected and filed motions to opt out in June 2002. As relevant here, petitioners argued that both Rule 23 and the Due Process Clause required that they be permitted to opt out because they sought substantial money damages. On March 27, 2003, the district court rejected all objections and approved class certification, the fairness of the settlement, and attorneys' fees of up to $900,000. Pet. App. 9a. The district court held that (b)(1)(A) certification was proper because separate adjudications of class members' claims would have risked creating incompatible standards of conduct for Tower, Pet. App. 84a-88a, and that (b)(2) certification was proper because the action was predominantly for injunctive relief rather than damages. Pet. App. 88a-89a. It rejected petitioners' due process arguments by labeling them rehashes of the arguments against (b)(1)(A) and (b)(2) certification because both inquiries turn on whether monetary or injunctive relief predominates in the action. Pet. App. 105a. It thus held that the Due Process Clause imposes no limits on mandatory class certification under Rule 23(b): "[N]o due process right to opt out arises in a properly certified Rule 23(b)(1) or Rule 23(b)(2) class action." Pet. App. 106a.

The Fifth Circuit affirmed on March 16, 2004. Notwithstanding the complaint's near-exclusive emphasis on damages, the court held that because both the class complaint and the state-court complaints included claims for injunctive relief, they presented the risk of "inconsistent or varying adjudications" that could "establish incompatible standards of conduct" for Tower under the terms of Rule 23(b)(1)(A). Pet. App. 2a-5a. Although many of the objectors, including hundreds of petitioners here, had yet to file suits against Tower

(having been enjoined from doing so since 1998), the court of appeals extended its rationale to *future* plaintiffs, supposing that future actions would "probably" request injunctive relief. Pet. App. 3a. The court also upheld the inclusion of damages claims within the (b)(1)(A) certification, even though the supposed risk of "inconsistent adjudications" stemmed *only* from the claims for injunctive relief. Pet. App. 2a-5a. The court declined to address the propriety of (b)(2) certification. In answer to petitioners' due process arguments (and all other arguments raised by the objectors), the court stated only that it affirmed "essentially for the reasons given in [the district court's] able opinion." Pet. App. 8a.[1]

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's Denial Of Petitioners' Right To Opt Out To Pursue Their Claims For Money Damages Conflicts With Decisions Of Other Courts Of Appeals And Of This Court

This Court has twice granted certiorari on the question whether "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120-21 (1994) (per curiam); *Adams v. Robertson*, 520 U.S. 83, 85 (1997) (per curiam) ("We granted a petition for certiorari to the Supreme Court of Alabama to determine whether the Alabama courts' approval of the class action and

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[1]The district court's opinion, however, was not a product of its own toil. It is, from beginning to end, largely a word-for-word recitation of Tower's proposed findings of fact and conclusions of law, right down to headings, footnotes, cross-references, and citations. *Compare, e.g.*, Pet. App. 82a-107a (approving class certification and rejecting due process arguments), *with* Defendant's Proposed Conclusions of Law, ¶¶ 114-40 & Conclusion, at 95-96 (same).

the settlement agreement in this case, without affording all class members the right to exclude themselves from the class or the agreement, violated the Due Process Clause of the Fourteenth Amendment."). In both cases, as here, the plaintiffs sought both monetary and injunctive relief. *Ticor*, 511 U.S. at 118; *Adams*, 520 U.S. at 86. In each case, however, this Court dismissed the writ as improvidently granted after briefing and oral argument on the merits. *Ticor*, 511 U.S. at 121-22; *Adams*, 520 U.S. at 85.

In *Ticor*, the Court dismissed in order to avoid deciding a potentially unnecessary constitutional question. There is a "substantial possibility," the Court noted, that class actions asserting monetary claims may only be certified under Rule 23(b)(3), which itself guarantees absent class members the right to opt out. 511 U.S. at 121-22. Therefore, the Court reasoned, it may not be necessary to consider whether the Due Process Clause provides that right. *Id.* Because *Ticor* did not provide the opportunity to decide the Rule 23 question, the Court dismissed to avoid reaching a constitutional ruling "potentially hypothetical to everyone" aside from the litigants before it. *Id.* at 122. In *Adams*, the Court dismissed because petitioners failed to establish that they had properly presented the due process issue to the Alabama Supreme Court. 520 U.S. at 86-87.

This petition presents precisely the same question on which the Court granted certiorari in *Ticor* and *Adams*, and it is free of the problems that led the Court to dismiss them. Here, the Court may decide the Rule 23 question first and reach the constitutional issue only if it determines that Rule 23 does not provide petitioners an opt-out right. Moreover, the petition comes from a court of appeals to which all issues were properly presented. Thus, this case offers a vehicle for addressing a substantial issue in which the Court has expressed "continuing interest," *Adams*, 520 U.S. at 92 n.6, and on which the Court

has twice previously granted review. It also presents the opportunity to resolve conflicts among the courts of appeals on issues of great importance.

1. The Courts Of Appeals Disagree On Whether Absent Class Members Have A Due Process Right To Opt Out Of Any Class Action That Asserts, Or Any Class Settlement That Releases, Substantial Monetary Claims.

In *Brown v. Ticor Title Insurance Company*, 982 F.2d 392 (9th Cir. 1992), *writ dismissed as improvidently granted*, 511 U.S. 117 (1994), the Ninth Circuit held that due process requires providing opt-out rights to any class members seeking substantial damages claims, even when the class also claims injunctive relief. *Id.* at 386. Here, the Fifth Circuit held precisely the opposite. Notwithstanding that the plaintiff class sought substantial monetary damages, that the settlement pays the class from a "Compensatory Damages Fund," Pet. App. 92a & n.20, and releases all damages claims, Pet. App. 74a-75a, 92a, and despite class counsel's concession that 1,000-1,500 class members held valuable individualized damages claims, R. vol. XI 37-38, 46-47, the court of appeals approved mandatory certification based on the mere presence of a boilerplate claim for injunctive relief.

The Ninth Circuit's *Ticor* decision stems from this Court's holding in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that absent members of classes seeking "wholly or predominantly" money judgments must be provided notice, adequate representation, and the right to opt out. *Ticor*, 982 F.2d at 392 (citing *Shutts*, 472 U.S. at 811-12 & n.3). The Ninth Circuit read *Shutts* to say precisely that:

> According to *Shutts*, minimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the

> class by executing and returning an 'opt out' or 'request for exclusion' form to the court," if monetary claims are involved.

Id. (citing *Shutts*, 472 U.S. at 811). This Court reaffirmed and bolstered the *Shutts* holding in *Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 846-48 (1999), in which the Court expanded upon the rationale for providing opt-out rights to absent class members with substantial damages claims and reversed the certification of damages claims in a mandatory Rule 23(b)(1)(B) class.

Subsequently, the Ninth Circuit reaffirmed *Ticor* and rejected—in direct contrast to the decision below—a class action settlement that released absent class members' substantial damages claims without providing an opt-out right. *Molski v. Gleich*, 318 F.3d 937, 950-51 (9th Cir. 2003) (citing *Ticor*, 982 F.2d at 392). The Seventh Circuit has gone even further, reading *Ortiz* to require opt-out rights "whenever possible." *Jefferson v. Ingersoll Int'l Corp.*, 195 F.3d 894, 899 (7th Cir. 1999) ("*Ortiz* . . . says in no uncertain terms that class members' right to notice and an opportunity to opt out should be preserved whenever possible."). The result below cannot be squared with *Molski* or *Jefferson*.

Moreover, several courts of appeals now permit a variety of flexible arrangements under Rule 23(b) in order to satisfy due process concerns. For example, the Second, Seventh, Ninth, Eleventh, and D.C. Circuits permit splitting actions into separate mandatory and opt-out classes (so-called "hybrid" actions), or certifying one mandatory class but nevertheless granting opt-out rights to some members at the courts' discretion. *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 166-68 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Jefferson*, 195 F.3d at 897-98; *Molski*, 318 F.3d at 950-51 & n.16; *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (splitting); *Holmes v. Cont'l Can Co.*, 706 F.2d

1144, 1160 (11th Cir.1983) (permitting opt-outs for mandatory class members); *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997).[2] Had the Fifth Circuit followed these holdings, it would not have certified petitioners' damages claims in a mandatory class and extinguished them through settlement, even assuming that the injunctive claims were properly certified.

In contrast to the Ninth Circuit's approach in *Ticor* and the Seventh Circuit's approach in *Jefferson*, other circuits, like the Fifth Circuit below, permit the certification of substantial damages claims into mandatory classes. Indeed, the Third, Fourth, Sixth, and Eighth Circuits go further than merely permitting such certification—they encourage mandatory class certification even when damages claims are present and opt-out certification is available. *See Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919-20 (6th Cir. 1989); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995) ("When either subsection (b)(1) or (b)(2) is applicable (b)(3) should not be used[.]"), *cert. denied*, 517 U.S. 1156 (1996).

Following commentators who characterize opting out as a *privilege* rather than a right, these courts reason that mandatory classes are preferable to opt-out classes largely for efficiency, convenience, and maximum *res judicata* effect. *See*

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[2]These courts frequently co-mingle discussion of what Rule 23(b) and due process require, essentially treating the two inquiries as coextensive or reading Rule 23(b) to require whatever is necessary to avoid due process problems. *See Robinson*, 267 F.3d at 165-66; *Jefferson*, 195 F.3d at 897-98; *Molski*, 318 F.3d at 947-51 & n.16. Thus, it is difficult to characterize them neatly as either due process or Rule 23(b) decisions. Typically, they are both.

Robins, 880 F.2d at 728 (citing Charles Wright et al., 7A *Federal Practice & Procedure: Civil 2d* § 1772, at 425 (2d ed. 1986); James Wm. Moore et al., 3B *Moore's Federal Practice* ¶ 23.31[3], at 236-37 (2d ed. 1987)); *DeBoer*, 64 F.3d at 1175 (citing Wright et al., 7A *Federal Practice & Procedure: Civil 2d* § 1777, at 521, for the proposition that "the *privilege* to opt-out of the action should be operable only when the class action is maintainable under [Rule 23(b)(3)] alone") (emphasis added, brackets in original); *see also Reynolds v. Nat'l Football League*, 584 F.2d 280, 284 (8th Cir. 1978) ("[W]hen the choice exists between (b)(1) and (b)(3) certification, generally it is proper to proceed under (b)(1) exclusively in order to avoid inconsistent adjudication or a compromise of class interests."). In so holding, these circuits believe that district courts ought to exercise their discretion to do something that, in petitioners' view, violates absent members' due process rights under *Shutts* and *Ortiz*. They expressly encourage certifying claims that could be certified with opt-out rights into mandatory classes instead, in part simply for the convenience of avoiding more extensive procedural requirements. *See Kyriazi*, 647 F.2d at 393 ("We therefore agree . . . that an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior *res judicata* effect and to eliminate the procedural complications of (b)(3)[.]").[3]

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[3]In direct contrast to this Court's emphasis on the due process rights of absent class members in *Shutts* and *Ortiz*, leading treatises recommend that courts intentionally deprive absent class members of opt-out rights where convenient. *See* Conte & Newberg, 2 *Newberg on Class Actions* § 4:8 at 31 (4th ed. 2004) ("Subdivisions (b)(1)(A) and (B) therefore have unique applicability in damages cases where the court is desirous of avoiding opt-out rights for class members."); Wright et al., 7A *Federal Practice & Procedure: Civil 2d* § 1777, at 521 (2d ed. 2003); Moore et al., 3B *Moore's Federal Practice* ¶ 23.31[3], at 236-37 (1995).

The Third, Fourth, Fifth, and Sixth Circuits are silent on why they are unconcerned for due process in this context. But the Eighth Circuit has been explicit: It has adopted a peculiarly narrow reading of *Shutts*. In direct conflict with the Ninth and Seventh Circuits, the Eighth Circuit interprets *Shutts* to require opt-outs only when absent class members are outside the personal jurisdiction of the certifying court. *See White v. Nat'l Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995); *DeBoer*, 64 F.3d at 1175. This approach defines class action due process concerns as purely jurisdictional in nature—simply a matter of minimum contacts with the forum state under *International Shoe v. Washington*, 326 U.S. 310 (1945).

The Eighth Circuit's view of *Shutts* is almost certainly incorrect. This Court has made clear that opt-out rights in class actions stem not just from personal jurisdiction concerns, but also from two other veins of due process jurisprudence. First, as *Shutts* explicitly noted, claims for damages are a form of property protected by the Due Process Clause. 472 U.S. at 807 ("[P]etitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.") (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). Opt-out rights, therefore, are not simply a matter of geography. They guard against the unconstitutional deprivation of property without adequate procedures, *see, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976), by allowing each class member to control the disposition of his or her constitutionally protected property. The teaching of *Shutts* is that although minimum contacts are *not* necessary to bind absent class members, minimal due process—notice, adequate representation, and an opportunity to opt out of damages actions—must be accorded all absent class members, not just those lacking jurisdictional contacts, before they can be said to have "consented" to be bound by litigation

or settlement. *Shutts* gave no indication that absent class members who had minimum contacts with the forum state could have been denied notice, adequate representation, and the opportunity to opt out.

Second, *Ortiz* elaborated on the Court's due process concerns, explicitly extending them beyond jurisdiction. The Court explained that opt-out rights stem from "our deep-rooted historic tradition that everyone should have his own day in court," *Ortiz*, 527 U.S. at 846 (citing *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (internal marks omitted)), and it specifically noted that "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class" where "[t]he legal rights of absent class members . . . are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary." *Id.* at 846-47. The Court therefore adopted a limiting construction of Rule 23(b)(1)(B) and reversed the certification of a mandatory damages class under that rule in order to avoid "serious constitutional concerns" presented by more permissive certification. *Id.* at 842, 845, 864.

This petition raises precisely the due process problem identified by *Ortiz*: Here, over 1,200 class members have been bound to a class settlement that extinguishes their legal rights, and offers them virtually nothing in return, against "their express wish to the contrary." *Id.* at 847. The due process question has been the subject of deepening confusion in the courts of appeals since this Court was unable to resolve it in *Ticor* and *Adams*, and this Court should again grant review to decide it.

2. The Courts Of Appeals Are Deeply Divided On Whether Rule 23(b) Provides Class Members The Right To Opt Out Of Class Actions That Assert Monetary Claims On Their Behalf.

In dismissing *Ticor*, this Court noted the "substantial possibility" that, "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not." 511 U.S. at 121. As discussed above, the Court dismissed the writ in *Ticor* because it could not reach the Rule 23(b) question before deciding the constitutional question. Here, the Court may decide the Rule 23(b) question first. Indeed, because the courts are as deeply divided over the Rule 23(b) questions as they are over the due process question, the interpretation of Rule 23(b) is an issue that would independently merit review even absent the substantial constitutional issue.

As explained in part 1, most courts of appeals read the Due Process Clause and Rule 23(b) as coterminous regarding when opt-out rights are required. *See, e.g.*, *Robinson*, 267 F.3d at 165-66; *Jefferson*, 195 F.3d at 897-98; *Molski*, 318 F.3d at 949-51 & n.16. As a result, the courts disagree about Rule 23(b) in much the same manner in which they disagree about the Due Process Clause: The Third, Fourth, Sixth, and Eighth Circuits hold that courts should certify claims into mandatory classes whenever possible, even when those claims could be certified in a (b)(3) opt-out class. *See Kyriazi*, 647 F.2d at 393; *Robins*, 880 F.2d at 728; *Barrow*, 878 F.2d at 919-20; *DeBoer*, 64 F.3d at 1175. In contrast, the Second, Seventh, Ninth, Eleventh, and D.C. Circuits interpret Rule 23(b) to require a more expansive opt-out right, and they permit a variety of flexible class certification arrangements to provide it. *See Robinson*, 267 F.3d at 166-68; *Jefferson*, 195 F.3d at 897-98; *Molski*, 318 F.3d at 950-51 & n.16; *Murray*, 244 F.3d at 812; *Holmes*, 706 F.2d at 1160; *Eubanks*, 110 F.3d at 96. In these

latter courts, class counsel cannot avoid (b)(3) certification and deny opt-out rights simply by appending an injunctive claim to an otherwise typical action for damages, as occurred here.

Within this broad split on Rule 23(b), there are also several relevant sub-splits. Most importantly, the courts of appeals conflict on whether to apply the "predominance" inquiry to all mandatory classes or only to (b)(2) classes.[4] The Ninth Circuit holds that courts must consider whether monetary or injunctive claims predominate before certifying *any* mandatory class. That is because the same Rule 23(b) and due process concerns obtain any time absent members may be denied opt-out rights: "[T]hese concerns would be applicable to *any* mandatory class, whether under Rule 23(b)(1) or (b)(2)." *Molski*, 318 F.3d at 949 n.13. This Court suggested in *Ticor* that it may also treat (b)(1) and (b)(2) identically for purposes of determining when Rule 23(b) requires opt-out rights. *See* 511 U.S. at 121.

In contrast, the Fifth Circuit, despite penning a leading case on the predominance inquiry under (b)(2), *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), does not, as the decision below makes clear, apply that test before

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[4]Although the text of Rule 23(b)(2) does not refer to a predominance requirement, the Civil Rules Advisory Committee Notes to Rule 23(b)(2) state that (b)(2) certification is improper for actions "in which the appropriate final relief relates exclusively or predominantly to money damages." 39 F.R.D. 69, 102 (1966). Therefore, some courts read predominance solely as a Rule 23(b)(2) requirement. *Shutts*, however, suggests that the predominance inquiry applies to *all* mandatory classes because it stems from the due process rights of class members who have claims for money damages, not from the particularities of any subdivision of Rule 23(b). *Shutts*, 472 U.S. 812 & n.3 (requiring the right to opt out for absent class members of actions seeking "wholly or predominantly" money judgments).

certifying mandatory (b)(1)(A) classes. The court below declined to inquire into the predominance of monetary or injunctive claims and instead adopted an opposite approach: It held that even in an action containing substantial damages claims, the presence of a claim for injunctive relief permits mandatory certification of the entire action and approval of a settlement releasing all claims.

If this Court were to hold that courts must consider predominance before certifying any mandatory class—thus requiring a predominance inquiry in this case—then it would necessarily resolve at least one further split: Regardless of whether they use predominance analysis for all mandatory classes or just (b)(2) classes, the courts of appeals disagree sharply on what such analysis requires. *See, e.g.*, Richard A. Nagareda, *The Preexistence Principle And The Structure of The Class Action*, 103 Colum. L. Rev. 149, 236 n.368 (2003) ("Judicial efforts to give practical meaning to [the predominance inquiry] have led to a dizzying array of results.").

The Third, Sixth, Seventh, and Eleventh Circuits follow a standard announced by the Fifth Circuit in *Allison*, 151 F.3d at 415 ("[M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."). *See Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417, at *1-2 (3d Cir. 2003); *Coleman v. Gen. Motors Corp.*, 296 F.3d 443, 446-47 (6th Cir. 2002); *Jefferson*, 195 F.3d at 897-98; *Murray*, 244 F.3d at 812. The Second and Ninth Circuits have explicitly rejected the Fifth Circuit's approach and instead employ an "ad hoc balancing" analysis announced in *Robinson*, 267 F.3d at 163-64. *See Molski*, 318 F.3d at 949-50 & nn.14-15.

The two approaches are wholly at odds with one another. The Second and Ninth Circuits grant district courts

broad discretion to balance several factors in an attempt to divine the overall purpose behind an action, *see, e.g.*, *Molski*, 318 F.3d at 949-50 & nn.14-15, and criticize the Fifth Circuit's "bright-line" approach for "nullify[ing] the discretion vested in the district courts through Rule 23." *Id.* at 950. The Fifth Circuit strongly disapproves considering the plaintiffs' intent, while the Ninth expressly relies on that inquiry. *Compare In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004) ("[C]ertification does not hinge on the subjective intent of the class representatives and their counsel in bringing suit."), *cert. denied*, --- U.S. ---, 2004 WL 2153519 (Oct. 04, 2004), *with Molski*, 318 F.3d at 950 ("[W]e have focused on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit.").

For all of these reasons, the courts' deep division on the application of Rule 23(b) merits review in addition to, and independently of, the due process question.

3. The Continuing Division Among The Courts Of Appeals On The Questions Left Unresolved In *Ticor* and *Adams* Harms Absent Class Members Across The Country.

In the words of one commentator, the courts of appeals are "all over the map concerning what due process requires for mandatory classes." Linda S. Mullenix, *No Exit: Mandatory Class Actions In The New Millennium And The Blurring Of Categorical Imperatives*, 2003 U. Chi. Legal F. 177, 207. The courts of appeals fundamentally conflict in several ways on the opt-out rights of absent class members. To reiterate: Regarding due process, some courts require opt-out rights in any case involving substantial damages and permit broad flexibility under Rule 23(b) to accommodate them. Some go further and require opt-out rights whenever possible. Other courts, like the court below, permit the denial of opt-out rights based on the mere presence of a claim for injunctive relief. Still others

recommend denying opt-out rights whenever possible. Regarding Rule 23(b), some courts inquire into whether monetary or injunctive relief predominates before certifying *any* mandatory class. Others, like the court below, only ask that question in (b)(2) certifications. Finally, all courts that employ a predominance analysis conflict on how it should be conducted.

This case highlights the extent of confusion in this area of law and its consequences for absent class members. The Fifth Circuit's certification of substantial damages claims under Rule 23(b)(1)(A)—a subdivision meant to guard against incompatible court orders resulting from multiple adjudications of the same *injunctive* claim, *see* Civil Rules Advisory Committee Note to Rule 23, 39 F.R.D. at 100—reflects a Rule 23(b) and due process jurisprudence in deep disarray. Its holding instructs class counsel, and settling defendants who seek to avoid individual suits, that they can subvert (b)(3) opt-out rights and bind absent class members into mandatory class actions simply by adding boilerplate injunctive requests to otherwise classic actions for damages. As a result, courts lock thousands of people into class actions against their will, depriving them of the right to pursue their own claims when they believe class counsel fails to represents their interests.

Here, over 1,200 people have been bound, against their express wishes to the contrary, to a settlement that provides (1) injunctive relief that is worthless to the many class members who will not borrow from Tower in the next five years, and (2) only a small fraction of the monetary relief that class counsel has acknowledged might be available to a significant portion of the class. This result is antithetical to our "day-in-court ideal," *Ortiz*, 527 U.S. at 846-47, and underscores the need to address, in this case, the issues that the Court was unable to resolve a decade ago in *Ticor*.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 12, 2004

United States Court of Appeals
Fifth Circuit.

Claudia SMITH; et al., Plaintiffs,
Claudia Smith; Wilbert Walker, Plaintiffs-Appellees,
v.
Rebecca CRYSTIAN; Martha Shaffer, Plaintiffs-Appellants,
v.
Tower Loan of Mississippi Inc.; American Federated Insurance Co.; American Federated Life Insurance Co.; First Tower Loan Inc., Defendants-Appellees,
v.
Clifton GRAY; Larry Pickens; 693 Movant Objectors, Appellants.

No. 03-60339.

March 16, 2004.

Before JOLLY, DUHE and STEWART, Circuit Judges.

PER CURIAM:*

This appeal challenges the district court's class certification under Fed. R. Civ. P. 23, its approval of the parties' settlement, its refusal to hold a third fairness hearing,

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and the notice provided for that fairness hearing. For the following reasons, we AFFIRM.

First, we address the district court's certification of the class and note the limited nature of our review:

> [T]he district court maintains substantial discretion in determining whether to certify a class action, a decision we review only for abuse. Implicit in this deferential standard is a recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to manage and control pending litigation. Whether the district court applied the correct legal standard in reaching its decision on class certification, however, is a legal question that we review de novo.

Allison v. Citgo Petroleum Corp., 151 F.3d 402, 408 (5th Cir.1998)(internal citations omitted); *see also Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 471-72 (5th Cir.1986) (stating "[a]ssuming the court considers the Rule 23 criteria, we may reverse its decision only for abuse of discretion").

Against this deferential backdrop, it is clear that the district court's certification of a mandatory class under Fed. R. Civ. P. 23 was proper. First, the district court did not abuse its discretion in finding that the class action prerequisites listed in Rule 23(a) were satisfied. *See James v. City of Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir.2001).

Second, the district did not abuse its discretion when it found that the requirements listed in Fed. R. Civ. P. 23(b)(1)(A) were met. In the instant case, numerous claims have already

been filed or are expected to be filed against Tower and each has requested or probably will request injunctive relief seeking to modify Tower's business practices. Moreover, the plaintiffs' complaint in this case requested multiple equitable remedies. *See Allison*, 151 F.3d at 421 n. 16. (stating that a risk of inconsistent adjudications is presented when the parties present claims for injunctive or equitable relief).[1]

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[1]The plaintiff's second amended complaint requested the following equitable relief:

> (a) A Court determination that the defendant, Tower, has violated the terms of that certain Consent Decree with the Federal Trade Commission, which required the defendant to include credit life and credit disability insurance charges as finance charges on the Truth in Lending Statements furnished to its borrowers who were charged for Credit Life and Credit Disability Insurance.
>
> (b) A Court determination of the rights of plaintiffs and the Class and corresponding rights of defendants.
>
> (c) An order enjoining defendants from engaging in further unfair, misleading and deceptive practices regarding the manner in which it procures and places credit life, credit disability and property insurance on the plaintiffs and Class Members, as well as future borrowers.

(d) A Court Order requiring defendant to refund to plaintiffs and all Class Members all premiums and related charges made to defendant or its agents.

(e) A Court Order requiring the defendant to cease and desist from violating Section 75-67-121 of Mississippi Code by charging premiums not in keeping with that usually and customarily paid for like insurance.

(f) A Court Order requiring the defendant to cease and desist from violating Section 85- 5-35 by engaging in Unfair Competition and Practices, by making, publishing and disseminating to the public false and misleading statements concerning the availability of loans, the costs of said loans, and the collateral to be taken for said loans.

(g) A Court Order requiring the defendants to inform all borrowers of the ownership, financial connection, and sharing of the borrower's premiums for all insurance charged by the defendant, Tower.

(h) A Court order requiring the defendants to terminate all "packing" of credit life, credit disability and property insurance unless and until the proposed plan is submitted to and approved by the Court.

These facts support the district court's conclusion that this case presents an inherent risk that different courts could reach "inconsistent or varying adjudications" which would "establish incompatible standards of conduct" for Tower. Fed. R. Civ. P. 23(b)(1)(A). For instance, the class sought "[a] Court Order establishing a fair method by which the borrowers have the option to file credit insurance claims directly with the insurance company." If similar relief is requested in another proceeding, a risk of incompatible standards of conduct could present itself if the two courts establish conflicting "fair methods" for filing credit insurance claims.

In sum, these considerations persuade us that the district court did not abuse its discretion when it certified the class under 23(b)(1)(A).[2]

> (i) A Court Order requiring the defendants to allow property insurance claims to be filed and adjusted without requiring the borrower to obtain an appraisal.
>
> (j) A Court Order establishing a fair method by which the borrowers have the option to file credit insurance claims directly with the insurance company.

[2]Based upon our decision that the district court did not abuse its discretion when it certified the class under 23(b)(1)(A), we need not address the alleged error regarding the district court's alternative holding certifying the class under 23(b)(2).

Third, it is similarly clear that the district court did not abuse its discretion when it approved the parties' settlement. We initially note the "strong judicial policy favoring the resolution of disputes through settlement." Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.1982). Therefore, a district court's approval of a settlement is given great deference and "will not be upset unless the court clearly abused its discretion." *Id.*

In the instant case, the district court applied the proper standard and found that the settlement was fair and reasonable. *See id.*[3] The objectors strenuously contend that the settlement

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[3] A district court shall not approve a settlement unless it is fair, adequate, and reasonable. Parker, 667 F.2d at 1209. In evaluating proposed settlements the district court should consider six factors:

> (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles [to] prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representative, and the absent class members.

Id. (citing *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir.1978)). Absent a showing of fraud or collusion, "the most important factor is the probability of the plaintiffs' success on the merits." *Id.*

was inadequate as evidenced by larger settlements and verdicts that have been obtained by plaintiffs in other cases. However, these cases are not relevant to the fairness of this settlement unless they are shown to be similar to the plaintiffs' claims against Tower -- a showing which has not been made. Moreover, even if these cases establish the appropriate benchmark, there is still no clear abuse of discretion because a number of the claims against Tower would probably be barred by the statute of limitations or subject to arbitration if filed individually. Thus, even if the monetary and compensatory relief provided by the settlement is not comparable to the relief provided in other cases, when these awards are discounted by the probability that the objectors will lose, the district court did not clearly abuse its discretion in approving the settlement.

Finally, we are not convinced that the district court erred when it refused to hold a third fairness hearing given the failure of the objectors to demonstrate before the district court any substantial issues requiring such a hearing beyond those that had been presented previously. *See Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir.1977) (recognizing a district court's right to "limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision"). Even assuming an error, however, it was harmless given the failure of the objectors to demonstrate prejudice to this court on appeal. *See* Fed. R. Civ. P. 61. Moreover, any allegation that the notice of the second fairness hearing was inadequate is without merit. Fed. R. Civ. P. 23(e); 5 James Wm. Moore et al., Moore's Federal Practice § 23.83 (3d ed.2000).

In sum, we are convinced that the district court carefully considered all of the pertinent objections that were made to the settlement agreement. Indeed, the district court modified the settlement in several respects, including narrowing the release

to ensure that certain claims were not barred by the settlement. It is therefore our view that the district court committed no reversible error in its thorough handling of this settlement and we AFFIRM essentially for the reasons given in its able opinion.

AFFIRMED

United States District Court,
S.D. Mississippi,
Southern Division

Civil Action No. 1:98cv212BrR

Claudia SMITH and Wilbert Walker, on behalf of themselves and all others
similarly situated, Plaintiffs,

v.

TOWER LOAN OF MISSISSIPPI, INC., et al., Defendants.

March 27, 2003

MEMORANDUM OPINION

BRAMLETTE, District Judge.

Introduction

This class action was originally commenced by Antonio Cole in May of 1998. The complaint and amendments thereto named, as defendants, Tower Loan of Mississippi, Inc., First Tower Loan, Inc. (hereinafter "Tower") as well as American Federated Life Insurance Company and American Federated Insurance Company, (hereinafter "American Federated"), which defendants responded to the complaint with their answers and counterclaims.

In July, 1998, plaintiffs filed a motion for class certification, and defendants cross-motioned for class certification. These matters were set for hearing on September

9, 1998.

Hereinafter the Court will reference a class action styled *Bryant Jones, et al v. First Tower Loan, Inc., Tower Loan of Mississippi, Inc., American Federated Life Insurance Company and American Federated Insurance Company* (hereinafter "*Bryant Jones*") which was lodged as Civil Action No. 2:96-cv-63-PG in the Hattiesburg Division of the United States District Court for the Southern District of Mississippi. The Jones case was a precursor to today's action wherein the plaintiff challenged loan/insurance practices of the defendants in terms almost identical to those stated by Antonio Cole who, in time, was replaced as class representative by Claudia Smith and Wilbert Walker by order dated November 19, 2001.

Findings of Fact

The *Bryant Jones* Class Action

Because of the similarity of claims made by *Bryant Jones* and Antonio Cole, this Court, at various hearings, sought and received from counsel a history of the Jones litigation. As said, the complaint here and the *Bryant Jones* complaint are essentially the same. In September, 1996, the District Court in the Hattiesburg Division temporarily certified a class for settlement purposes in Jones at the request of the plaintiff represented by the Deakle Law Firm at Hattiesburg. From what this Court has been able to discern from solicited comments by counsel at various hearings in this case, as well as from documents filed herein, settlement negotiations resulted in a settlement agreement which focused on equitable relief with monetary relief also provided. This settlement agreement was preliminarily approved by the District Court which certified it under Rule 23(b)(1)(A),(b)(1)(B) and (b)(2). This proposed

settlement was aborted, followed by a second settlement agreement which came approximately six months later and which also failed when class counsel filed a motion to decertify, which motion was granted.

The *Bryant Jones* complaint which, as said, is almost identical to the Cole complaint sought Class Certification. In order to better understand what appear to be antithetical positions of the Jones group represented by the Deakle Law Firm which group now opposes the relief sought by Cole, the Court, at one of the hearings, made inquiry of all counsel regarding this matter. No satisfactory explanation was provided.

As this Court faced in the early days of this proceeding, the Hattiesburg District Court also considered the prudence of allowing substantially similar actions filed in State Court to proceed. As was true here, the Hattiesburg Court issued an injunction prohibiting parallel legal actions against Tower for a period of time, following which injunctive period, numerous claims were filed against Tower in Jefferson and Claiborne counties of this State. These and other State Court complaints then and now attack policies and practices implemented by Tower, and they seek equitable relief and monetary award. These actions have been stayed by this Court.

It should be mentioned that in conjunction with the dismissal of the class allegations, the District Court in *Bryant Jones* entered an order continuing the injunction prohibiting parallel legal actions against Tower for forty-five days. Notwithstanding, former class counsel in *Bryant Jones* filed similar actions in two state court cases approximately eleven days later. (Parker, 8/27/02 Tr. p. 81-82; exh.D-3(n);exh.D-3(o)) One complaint ("*Arbuthnot*,", exh.

D-3(n))joined the identical claims of 339 Tower borrowers in the Circuit Court of Claiborne County, Mississippi. The other complaint ("*Barnes*," exh. D-3(o)) joined the identical claims of 317 Tower borrowers in the Circuit Court of Jefferson County, Mississippi. The state court complaints contain a summary description of the actions virtually identical to the summary description appearing in both *Bryant Jones* and in this case, but for the deletion of the federal law allegations.

Arbuthnot and *Barnes* are not the only pending state court challenges of policies and practices of Tower and American Federated. A series of ten similar actions were filed in four different state courts. (Exh. D-3(a) thru D-3(j)) (hereinafter the "Norris/Sakalarios" actions or complaints).[1] Again, these state court actions track virtually verbatim the allegations of the class complaint here.

Fundamental to the *Arbuthnot*, *Barnes*, Norris/Sakalarios and other state court complaints is the general challenge of how Tower does business. All of the state court complaints attack policies and practices uniformly implemented by Tower, *i.e.*, conduct which is also challenged in the subject class action complaint. Each lawsuit centers on whether Tower can rely on the language of its standard loan documents.

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[1]Because of the number of substantially similar state court actions and objections to the perndding settlement, a feasible way to sometimes identify complainants and objectors is often by reference to their counsel. In this instance, Larry Norris and Anthony Sakalarios were the counsel filing the referenced complaints. Messrs. Norris and Sakalarios also filed the *Pitts* state court action. Exh. D-3(k))

Most of the state court actions directly seek injunctive relief and virtually all demand some form of equitable relief. Indeed, the Norris/Sakalarios complaints specifically request five different state courts for, among other things, orders (i) enjoining Tower from procuring insurance for "plaintiffs and others as well as future borrowers"; and (ii) requiring Tower to terminate all insurance placement "unless and until the proposed plan is submitted to and approved by the court." (Exh. D-3(a) thru D-3(k), count XII)[2]

The Complaint

Before the Court is a class action amended complaint setting forth numerous challenges to the lending and insurance practices of Tower and American Federated. Plaintiffs have charged that Tower engaged in a pattern of practice to defraud its borrowers by forcing them to purchase insurance by deceitful means. These misleading loan disclosures, coercive marketing practices and the requirement of insurance placement on property which is essentially valueless, constitutes what has come to be known in the industry as "packing". Additionally, Tower was accused of "flipping", a term which identifies a practice of encouraging the borrower to pay off a loan prior to maturity date, resulting in an alleged ingenious method of calculating insurance and interest refunds highly disadvantageous to the customer. These practices are

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[2]In addition to the above-referenced *Bryant Jones* and state court actions, the Chapter 13 bankruptcy trustee has petitioned for authority to pursue an insurance "packing" and "flipping" action on behalf of Tower debtors in bankruptcy. (Exh. D-7, ¶ 3, n. 2)

facilitated by the "captive" insurer allegation which claims that American Federated is the alter ego of Tower Loan.

There are numerous other allegations, as well, including violations of the Federal Truth-in-Lending Act, the Federal Fair Debt Collection Practices Act, the Civil Rights Act of 1991, the Mississippi Small Loan Regulatory Act and including allegations of mail fraud, statute violations, antitrust law violations and others.

The complaint seeks declaratory, injunctive and equitable relief, restitution, punitive damages and compensatory damages.

The September 9, 1998 Hearing
Certification Opinion and Order

On September 9, 1998, the Court conducted a hearing on plaintiffs' motion and defendants' cross motion for class certification. The Court found class certification to be warranted under Rule 23(b)(1)(A). In addition and alternatively, the Court certified the Class under Rule 23(b)(2) and further in the alternative under Rule 23(b)(1)(B). The Court declined to certify the Class under Rule 23(b)(3). The Court defined the Class to consist of the following:

> All persons who became obligated to pay any premium or other costs of insurance written by American Federated Companies in connection with loans made by Tower Loan Companies in Mississippi during the period February 15, 1993, through September 9, 1998, or who have asserted or assert claims against American Federated Companies or Tower Loan

> Companies concerning any premium or other costs of such insurance (except for persons who have settled their claims).

In certifying the Class under Rule 23(b)(1)(A) the Court concluded:

> This controversy squarely falls under Rule 23(b)(1)(A). For example, Tower is required by both law and practical circumstances to deal with its legions of borrowers the same way. The comprehensive federal and state regulatory frameworks apply across the board. There is no feasible way for Tower to do business without standardized procedures. The thrust of Cole's action is for equitable relief coupled with a demand for punitive damages flowing from a requested judicial condemnation of Tower's uniform way of doing business.
>
> Separate and multiplicative lawsuits have already materialized.... With one exception, every one of these parallel lawsuits alleges insurance packing premised on the claim that buying insurance was improperly made a condition of the loan. Moreover, every lawsuit without exception challenges the reasonableness of insurance premiums and most question other loan terms and the method of calculating insurance premium and finance charge refunds.... Resolution of every controversy thereby turns on the adequacy and enforceability of Tower's loan documents as

> well as the effect of compliance with regulatory guidelines by Tower and the American Federated Companies. Virtually every parallel action seeks injunctive relief.... Furthermore, just like Cole, some 68 plaintiffs in five different state courts have specifically demanded a court-ordered plan establishing future procedures for insurance placement.

In support of its Rule 23(b)(2) certification we made the following findings:

> Certification under Rule 23(b)(2) is not precluded because the class also seeks money damages. "Class certification under Rule 23(b)(2) does not automatically preclude an award of monetary damages when the primary relief sought is injunctive or declaratory." ... The test is whether the request for equitable or declaratory relief predominates. ....
>
> The equitable and declaratory relief sought by Cole and the class predominates under [the] criteria [established by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir.1998)]. The monetary relief sought by Cole is actually outside the Rule 23(b)(2) discussion in *Allison* which addressed the extent to which nonequitable monetary relief may be obtained in a(b)(2) proceeding.... Cole seeks the restitution and disgorgement by defendants of the insurance premiums and related charges allegedly unlawfully collected. As such, the demand is not in the nature of

damages but is instead an extension of the equitable remedy.... Rule 23(b)(2) is readily applicable.

Even if the monetary relief sought by the class were termed nonequitable, (b)(2) certification would nonetheless remain appropriate. Such "damages" would be "incidental" under *Allison*. Cole argues for certification on the ground that "the amounts due the individuals under [the] circumstances [alleged in the amended complaint] are generally so small that these are considered to be 'negative value' cases." ... Further, it is not just that the amounts allegedly due each individual class member are very small. Such amounts are not individualized claims under *Allison* .... These amounts are readily capable of computation by following the objective standards of calculating the amounts of insurance premiums charged plus the associated finance costs. Such a determination is not at all dependent on intangible, subjective differences among Class Members. Nor do Cole's fundamental claims require additional hearings for each individual's case. The amounts sought by the class are truly in the nature of a group remedy.

The September 9, 1998 Stay Order

Following announcement of its determination that the proposed Class would be certified under Rules 23(b)(1) and (b)(2), the Court then considered Tower's motion to enjoin and

stay parallel proceedings. The Court recognized that it had certified this action "as a mandatory class action." Consistent with this intent and pursuant to the All Writs Act, the Court granted Tower's motion "in order:

> to conserve judicial resources;
>
> to properly protect the court's jurisdiction over this class action, and to enforce and effectuate the order of certification;
>
> to eliminate the risk of inconsistent or varying adjudications which may subject defendants to incompatible standards of conduct;
>
> to prevent the prosecution of other actions that would frustrate the court's efforts to consider, oversee and decide this entire complex controversy, or perhaps eventually to craft a classwide settlement;
>
> to eliminate the risk of inconsistent or varying judgments that may affect the rights of Class Members and impair their ability to protect their interests;
>
> to preclude the risk of other actions so interfering with the court's consideration or disposition of this action as to impair the court's flexibility and authority;
>
> in light of the court's determination that the class has been properly certified, to channel the litigation in its entirety to this Court and thereby

> to utilize the class action mechanism as the ideal means for resolving the claims at issue; and
>
> to achieve the ends of justice entrusted to this Court."

The order enjoined the commencement of actions related to the subject matter of this class action. The Court also specifically stayed the state court actions pending against Tower.

Appeal of the Certification and Stay Orders

Following the September 1998 hearing and the orders which followed, various motions were filed including motions for and on behalf of the clients of Mr. John Deakle, Mr. Michael Sims, Mr. Larry Norris, and Mr. Anthony Sakalarios. These motions were on behalf of class members who were also state court plaintiffs seeking a lift of the stay regarding parallel proceedings and/or permission to intervene. It is the recollection of the Court that these matters were ripe for briefing and a scheduled hearing. At this point in time the Deakle Group perfected an appeal to the Fifth Circuit regarding the September 9, 1998, class certification order, together with the order staying parallel proceedings. The effect of the appeal was that all proceedings before this Court were held in abeyance until the July 13, 2000 remand from the Fifth Circuit ruling which held that the District Court did not abuse its discretion in staying parallel proceedings. Prior actions of this Court were not disturbed by the Appellate Court which also declined to exercise jurisdiction over the class certification issue.

Hearing of September 20, 2001

Following remand, the Court scheduled a hearing for September 20, 2001, wherein all litigants were invited to participate and to present their respective positions concerning class certification, including the presentation of evidence, and oral argument. The purpose of this hearing was to refresh the Court on all matters pending and to provide the litigants an opportunity to state their positions on class certification. By this time motions to reconsider class certification and/or for leave to intervene were on file for clients of Mr. Matt Abbott and Mr. Merrida Coxwell. At the hearing Mr. Larry Norris, on behalf of class members represented by him, submitted affidavits of borrowers, and Mr. Sakalarios took the stand and testified regarding practices of Tower Loan which he considered to be an infringement upon the rights of his clients. Essentially, complaints voiced by Mr. Sakalarios are those stated in the complaint by the class representative.

Following the hearing, the Court on September 28, 2001 entered an order denying the motions to lift the stay on parallel proceedings and reserved the right to reconsider the ruling at a future time in conjunction with motions and other matters being filed in this case.

At sometime prior to the September 20 hearing the Court had become aware of the decision by the United States *Supreme Court in Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). This decision gave the Court concern regarding class certification under Rule 23(b)(1)(B). Responding to this concern, the parties jointly moved the Court to rescind the class certification under this rule, and on December 3, 2001, the Court entered an order granting the motion and continuing certification under Rules

23(b)(1)(A) and (b)(2).

The Class Action Settlement Agreement

Although the undersigned did not participate in settlement negotiations, the Court was aware that the claims stated in the Antonio Cole complaint were the same as those of *Bryant Jones*. The Court, as hereinabove stated, was also aware that *Bryant Jones*, as class representative, had reached a settlement with the defendants which was eventually thwarted by concerns and/or aspirations which are not yet entirely clear to this Court. Secondly, the Court was aware that Chief Magistrate Judge John Roper who was familiar with the *Bryant Jones* settlement proceedings, made himself available in this case, in compliance with local rules, to assist in negotiations for an amicable resolution of all matters. These discussions were ongoing for many months. They included numerous sessions, and were both contentious and productive, resulting in settlement terms which are subject to the approval of this Court. Throughout, Tower and American Federated maintained that they had been in full compliance with all Federal and State law in a highly regulated consumer finance and insurance industry, while class representatives and counsel, all according to information provided at the fairness hearing, continued to embrace all matters set forth in the their complaint. Summarily, the parties announced that a settlement agreement had been reached, they tendered the agreement to the Court and sought preliminary approval.

Settlement Terms

Class Definition: The Settlement Agreement contemplates that the Class will continue to be defined as set forth in the Court's December 3, 2001 amended order of class

certification. The parties seek final certification of the Class under Rules 23(b)(1)(A) and (b)(2) to achieve full, complete and final settlement of all claims of all Class Members. The Class appears to consist of approximately 103,000 persons.

Equitable Relief: The Settlement Agreement provides first and foremost for extensive injunctive relief over a five-year period. The 70 different remedial provisions plus multiple standardized document attachments address virtually every fundamental aspect of making loans on which credit life, credit disability or property insurance may be placed. Numerous provisions ensure comprehensive, understandable disclosures to, and meaningful choices for, the borrower concerning insurance availability, cost and coverage alternatives if insurance is desired, and the financial implications of loan renewals and refinances. Industry experts credibly maintain Defendants have made numerous concessions beyond what the law arguably requires.

Monetary Relief: The Settlement Agreement provides for monetary relief characterized as compensatory damages, punitive damages, special payments and attorneys' fees. Total monetary relief exceeds $7.5 million.

Compensatory and Punitive Damages: For purposes of paying compensatory and punitive damages, the Settlement Agreement distinguishes Class Members according to whether they have ever been a sole obligor on a loan as opposed to a co-borrower, whether they borrowed money more than once during the Class period, and whether they received insurance benefits. Sole obligors receive twice as much in compensatory damages and in punitive damages as do borrowers who were never sole obligors. Repeat borrowers receive more in punitive damages than nonrepeat borrowers. Borrowers who benefited

from payments under insurance policies do not participate in the compensatory or punitive damages funds. Total compensatory damages payments are projected to exceed $2.23 million; total punitive damages payments are anticipated to be greater than $4.39 million.

Special Payments: In light of the procedural history of this controversy, the Settlement Agreement provides for a special payments fund for present and former Class Representatives and certain state court plaintiffs. The fund totals $45,500. Present Class Representatives Smith and Walker and Class Representatives in the *Bryant Jones* action are to each receive $2,500. Class Members who were plaintiffs in related individual actions at the time the district court in *Bryant Jones* stayed such actions are to each receive $1,000.

Attorneys' Fees: The Settlement Agreement provides for defendant payment of such attorneys' fees as may be established by the Court up to $900,000. Class Counsel may not seek more than $900,000 in fees. Moreover, the Court is afforded the discretion to allocate reasonable attorneys' fees among Class Counsel, former class counsel in *Bryant Jones*, and any other attorneys determined to have made a material contribution to the settlement of this action. Under the Settlement Agreement, however, total attorneys' fees in the aggregate may not exceed $900,000 no matter how allocated by the Court.

Administrative Costs: The Settlement Agreement imposes responsibility on Tower and American Federated for payment of the considerable costs and expenses associated with settlement implementation. Such costs include, but are not limited to, the costs of mailing settlement notices to every Class Member, publishing notice, mailing distribution checks to Class

Members, and Settlement Administrator fees. All of such costs are over and above the $7.5 million in monetary relief described above.

Preliminary Court Approval and Notice of the Settlement

Essentially, the proposed settlement contemplates that the class will continue to be defined as set forth in the Court's December 3, 2001 amended order of class certification. The Settlement was preliminarily approved on April 16, 2002, by order which directed the issuance of notice to the class and the scheduling of a fairness hearing. The class was continued as previously defined and was certified as a mandatory class pursuant to Rule 23(b)(1)(A) and Rule 23(b)(2). The parties were directed to issue notice both by mail and publication. The form of notice which adequately explained the provisions of the settlement and also advised class members of their right to object, was approved by the Court. The Settlement Administrator in an order of April 16 from the Court, was directed to cause the Notice of Settlement to be mailed on or before May 3, 2002, to all class members, using the last known address obtainable from the defendants' records. The Court further directed the Settlement Administrator to cause the Notice of Settlement to be published in eleven different newspapers.

The Settlement Administrator utilized the services of DMCS/Sourcelink, the largest mail production facility in the State of Mississippi, to assist in the mailing of the Notice of Settlement. On May 3, 2002, over 100,000 Notices of Settlement were mailed to class members. In August of 2002, however, errors were discovered associated with these mailings. Due to a previously undetected computer software deficiency at DMCS/Sourcelink, duplicate mailings were made

to approximately 34,684 class members, and no Notice of Settlement was mailed to approximately 36,370 class members.

The Notice of Settlement was duly published once in the designated newspapers as directed by the Court. Notice by publication was fully achieved without error.

Class counsel and defendants advised the Court before the scheduled fairness hearings of August 27, 2002 of the errors in mailing of the Notices of Settlement. In light of the substantial preparations already undertaken by the Court, the parties, and objecting class members, the Court proceeded with the August 27 hearing. The Court recognized, however, the likely necessity of a second hearing to permit mailing of supplemental notice to class members to whom no Notice of Settlement had been mailed.

The Court conducted the hearing on the Settlement on August 27, 2002. At the conclusion of the presentations of objecting class members, the Court recessed the hearing for continuation on a date to be determined by the Court after issuance of supplemental notice.

On September 18, 2002, the Clerk entered the Court's order directing issuance of supplemental notice to the Class in conjunction with the resumption of the settlement fairness hearing on December 9, 2002. Specifically, the Court directed that supplemental notice be mailed to those class members to whom the previous notice was not mailed and for whom defendants had address information, or as to whom a mailed original notice was returned as "undeliverable." The Court further directed the republication of notice on two more occasions in the same eleven newspapers previously utilized. The Court approved the form of supplemental notice to be

mailed and published.

The Court's September 18 notice directives required searches for more current addresses through the National Change of Address Program, and to the extent that process was unavailing, through a consumer reporting service such as Equifax which uses social security numbers in the search process. Such searches were conducted and the mailing of supplemental notices proceeded.

Tower and the Settlement Administrator again utilized the services of DMCS/Sourcelink to assist in the mailing of the Supplemental Notice of Settlement. On October 1, 2002, the Settlement Administrator, with the assistance of DMCS/Sourcelink, caused the mailing of supplemental Notice of Settlement to the 36,370 class members to whom notice had not previously been mailed. Thereafter, DMCS/Sourcelink advised the Settlement Administrator that a computer field combination error resulted in 9,775 of the above 36,370 supplemental Notices of Settlement being mailed with incomplete addresses. The Settlement Administrator, through DMCS/Sourcelink, promptly rectified the computer field combination error and caused the remailing of the 9,775 supplemental Notices of Settlement on October 18, 2002.

The supplemental Notice of Settlement was duly published twice in each of the designated eleven newspapers as directed by the Court. Due to an error by the Northeast Mississippi Daily Journal, publication of supplemental notice actually occurred three times in that newspaper. Notice by publication was otherwise fully achieved without error.

Out of the 36,370 supplemental Notices of Settlement mailed on October 1, 2002, and the 9,775 supplemental Notices

of Settlement remailed on October 18, 2002, approximately 20,000 Supplemental Notices of Settlement were returned as "undeliverable." Under the Settlement Agreement as preliminarily approved by the Court, there is no obligation to make a second mailing in those instances when the Notice of Settlement is returned "undeliverable." Nevertheless and even though notice by publication was properly accomplished, class counsel and defendants sought authorization for a second mailing of notice to those class members to whom the original Notice of Settlement was not mailed and as to whom the supplemental Notice of Settlement was returned as "undeliverable." By order dated November 6, 2002, the Court directed such a second mailing of supplemental notice to certain class members.

Tower and the Settlement Administrator similarly again employed the services of DMCS/Sourcelink to accomplish the second mailing of supplemental notices. Updated addresses were obtained for approximately 15,680 class members. Supplemental Notices of Settlement were mailed to such Class Members on November 20, 2002.

Thus, the Notice of Settlement was published in eleven newspapers throughout the State of Mississippi and the supplemental Notice of Settlement was published on two other occasions in those same newspapers for a total of three separate statewide publications of either the original Notice or supplemental Notice of Settlement as directed by court orders. In addition, each class member for whom an address was available was mailed an original Notice of Settlement or supplemental Notice of Settlement. Further, if either the original Notice of Settlement or the supplemental Notice of Settlement, was returned as "undeliverable," a more current address was sought through the National Change of Address

Program and, if that process did not result in a more current address, through Equifax, a nationally-known consumer reporting service. If either of those services revealed a new or different address, the original Notice or supplemental Notice of Settlement was mailed to the new address.

As of December 5, 2002, either the original Notice or supplemental Notice of Settlement had been mailed to 90,686 class members without being returned as "undeliverable." Approximately 87.65% of the 103,468 class members were served with the original Notice or supplemental Notice of Settlement by United States mail.

Objections to the Settlement

Class members submitted "position statements" in varying forms in response to the original and supplemental Notices of Settlement. Approximately two dozen class members submitted responses without the apparent assistance of counsel. Ten class members filed purported "request for exclusion: from the class without providing any explanation for exclusion." In another instance one lawyer wrote the Clerk and attached a list of several hundred persons whom the lawyer asserted were individuals wishing to object to the settlement. There were no specific grounds stated.

Various groups of class members have filed objections through counsel alleging grounds in opposition to the Settlement. These groups may be identified as follows:

(a) One group of objectors consists of 693 class members who filed both objections to the Settlement and a "motion to opt out of the Settlement." These class members are represented by former *Bryant Jones* class counsel in the state

court actions filed on the heels of the collapse of the *Bryant Jones* settlement.

(b) Clifton Gray and Larry Pickens, through the same counsel representing the above referenced 693 class members, have sought to intervene here as substitute class representatives. Messrs. Gray and Pickens have also joined in the objections to the Settlement filed by the above referenced 693 class members.

(c) Rastus Hathorne and 67 other class members who are plaintiffs in the Norris/Sakalarious state court actions have filed objections to the Settlement.

(d) Pam White, 33 other class members and the bankruptcy Chapter 13 trustees for the Southern and Northern Districts of Mississippi have submitted objections to the Settlement. These class members are parties to a substantially similar state court action and the bankruptcy trustees seek to pursue identical actions on behalf of Tower debtors in bankruptcy.

(e) Class members Rebecca Crystian and Martha Shaffer have filed a motion to "opt out" of the class. Ms. Crystian and Ms. Shaffer are plaintiffs in the Barnes state court action where they are represented by former *Bryant Jones* counsel.

(f) Leroy Calvert, Jr. and 10 other class members have filed objections to the Settlement substantially similar to those of the Pam White group.

(g) Annie Mae Alexander, Leroy Anderson and Earl Appleberry submitted objections to the Settlement.

(h) The foregoing objections were filed before the August 27, 2002 fairness hearing. On November 22, 2002, Randolph Sullivan and 79 other purported class members filed objections in conjunction with the resumption of the fairness hearing on December 9, 2002. The Sullivan group did not urge any objections not otherwise already of record.

(i) Della Mae Allen and 32 other purported class members filed a "motion to opt out" of the class following the issuance of supplemental notice.

The objections urged by the objectors identified above in paragraphs (a)-(d) and (f)-(h) largely parrot one another. No objector maintains this controversy should not have been certified as a class action proceeding. Except for Messrs. Gray and Pickens, all contest, however, the certification of a mandatory class.

Class member Christine Brooks seeks to "opt out" of the class based on contentions that her individual claim is for the alleged bad faith failure to pay insurance benefits. Counsel for Ms. Brooks orally represents that she does not contend the defendants engaged in unlawful insurance "packing" or "flipping." Ms. Brooks state court complaint never alleges, however, an insured loss for which benefits were never paid. Moreover, her state court complaint contains two counts addressing allegedly excessive charges for credit life insurance premiums.

There appear to be approximately 1,200 persons who have objected to or sought to opt out of the Settlement. The class consists of over 103,000 members. Thus, only approximately 1.2% of the total class opposes the Settlement or seeks to "opt out" of the Settlement.

Out of the above 1,200 persons, the group of 693 objectors, Mr. Gray, Mr. Pickens, Ms. Crystian and Ms. Shaffer are represented by former *Bryant Jones* counsel in the copycat state court proceedings filed concomitantly with abandonment of the *Bryant Jones* settlement. Another 68 persons are parties to the Norris/Sakalarios state court actions which are virtually identical to this class action proceeding. The 38 persons forming the Pam White group are also parties to a substantially similar 1998 state court action. Thus, approximately two-thirds of the objectors are represented by counsel seeking to leverage identical claims under liberal state court joinder practices in carefully selected state court forums.

The only affidavits submitted by objecting class members were those of Clifton Gray, Larry Pickens, Annie Mae Alexander, Larry Anderson, Earl Appleberry, Rebecca Crystian and Martha Shaffer. None of the affidavits sets forth any alleged unique, individual circumstances. Indeed, Messrs. Gray and Pickens seek to serve as substitute class representatives. Ms. Crystian and Ms. Shaffer are multiple repeat borrowers. Ms. Crystian borrowed from Tower as recently as 2001; Ms. Shaffer has an existing relationship with Tower and American Federated today.

Fairness Hearing

In accordance with the notice, a fairness hearing was held on August 27, 2002. Multiple exhibits were produced, and witnesses were called by the defendants in support of the Settlement, and they were cross-examined by counsel for objectors. Counsel for the above-identified group of 693 objectors, the Rastus Hathorne group, the Pam White group, the Annie Mae Alexander group, the bankruptcy trustees, Mr. Gray, Mr. Pickens, Ms. Crystian, Ms. Shaffer and Ms. Brooks

appeared at the August 27 hearing. While they elected not to call any witnesses, objectors' counsel, as said, cross-examined the witnesses called by Defendants in support of the Settlement. Counsel presented legal arguments challenging the mandatory participation aspect of the class certification and the predominance of injunctive relief. They challenged the sufficiency of the Notice of Settlement. All counsel were afforded liberal opportunities to be heard.

Counsel for the objecting class members argued that each of their clients is a victim of the institutionalized and improper predatory lending practices - packing and flipping and other such conduct. At the hearing the Court was concerned as to whether counsel would be able to identify any individual claim which, from a compensatory damage perspective, would justify incurring expenses associated with litigation. From arguments presented, the Court discerned that these individual cases, should they proceed in state court, would be joined under liberal state procedural rules allowing a confluence of plaintiffs and as one lawyer put it, " that's what plaintiffs' lawyers do in the State of Mississippi in state court." (*See* Transcript of 8/27/02, p. 287-288)

The Randolph Sullivan group first appeared at the December 9, 2002 hearing. Counsel for the Randolph Sullivan group, like other objectors' counsel, elected not to call any witnesses to address the Settlement. The Della Mae Allen group did not appear at the December 9 hearing. Other than counsel for the Randolph Sullivan group, the only other objectors' counsel who appeared at the December 9 hearing were counsel for the Pam White group.

Conclusions of Law

Judicial approbation of a settlement agreement in a class action must not be granted unless the court concludes with certainty that hereinafter discussed factors are achieved. Rising to the top of all considerations is the best interest of class members. The class action phenomenon is a useful tool, but in today's litigious environment it also presents a unique opportunity for lawyers to engage in activities which are motivated more by their own self-interest than by the welfare of those whom they represent. Are the class action and settlement agreement pretextual in the sense that they are mere vehicles for the transfer of wealth into the pockets of counsel or, on the other hand, are the terms of the settlement fair, adequate and reasonable and based on the rule of law? Are the class members twice victims, first of the activities complained of in the suit and secondly at the hands of self-serving class counsel? Moreover, is the settlement a product of collusion between the parties? Mindful of the possibility of these motivations, the Court has carefully examined all of the documents, has conducted various hearings to engage counsel and witnesses in an effort to discover the facts. For the reasons hereinafter set forth this Court has come to the conclusion that the settlement is fair, reasonable and adequate.

Fairness Hearings

The Adequacy of Notice

According to the Manual for Complex Litigation (Third) (§ 30.212), Rule 23(e) notice of a proposed class action settlement should:

(1) describe the essential terms of the proposed settlement;

(2) disclose any special benefits provided to the

> class representatives;
>
> (3) provide information regarding attorneys' fees....;
>
> (4) indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to (or, if permitted, for opting out of) the settlement;
>
> (5) explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set out those variations; and
>
> (6) prominently display the address and phone number of class counsel and the procedure for making inquiries.

Applying these factors to the Notice of Settlement provided in this case, both the original as well as the supplemental notice, the Court finds that the above prerequisites were met. The Notice of Settlement as mailed and published complied with the Court's directives under Rule 23(e) concerning the compromise and dismissal of this proceeding. The Notice of Settlement adequately (i) defined the class; (ii) identified the parties; (iii) described the parties' claims and defenses; (iv) summarized the terms of the proposed settlement; (v) disclosed class counsel's intent to apply for fees; (vi) announced the settlement hearing; (vii) disclosed the means for objecting to the settlement; and (viii) prominently displayed the address and phone number of class counsel with an accompanying invitation for inquiries concerning the notice

and settlement.

The Notice of Settlement (both the original and supplemental notice) contained and properly stated all of the essential elements necessary to satisfy any due process concerns regarding the content of the notice. The manner in which notice was disseminated satisfied due process. The Court finds that reasonable efforts were expended to afford individual class members actual notice by mailing. Repeated publication of the Notice of Settlement in numerous newspapers throughout the State of Mississippi met all due process requirements.

Mailing supplemental notice to class members who were not mailed the original notice gave them an opportunity to submit objections to the Settlement at the second fairness hearing held on December 9, 2002, together with the opportunity to participate therein. Thus, class members were afforded all rights granted them under Federal Law and under the Federal Rules of Civil Procedure.

Having found that the notice procedures followed in conjunction with the August 27, 2002, and the December 9, 2002, hearings adequately afforded all class members an opportunity to be heard concerning the fairness, adequacy and reasonableness of the proposed Settlement, the Court finds that their rights under the Constitution, under Federal Law as well as under the Rules of Civil Procedure were adequately protected.

The Settlement Agreement

There appeared to be no well defined standards for judicial implementation concerning the approval of class

settlements either under Rule 23(e) or under other Federal Rules and law. Courts, nevertheless, have determined that class action settlements should only be approved when they are "fair, adequate and reasonable." In re Catfish Antitrust Litigation,939 F.Supp. 493, 496(N.D.Miss.1996) (citing In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 207(5th Cir.1981), and *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.1982)). To make this determination, the Fifth Circuit has found:

> There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives and absent class members.

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir.1983).

The Court considers each criterion and facet, in turn.

A. Existence of Fraud or Collusion

Although according to *Newberg on Class Actions* § 11.51 (4th ed. 2002) Courts are to "presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered," this Court has made no such presumption. Rather, the Court has analyzed every aspect of the settlement in an effort to determine, independently, whether

this settlement is driven by collusion, self dealing and/or attorneys' fees. There is no evidence of fraud or collusion in this case. At the fairness hearing, the Court called on objectors to substantiate allegations of collusion set forth in their written submissions. Objectors' counsel represented that they made no claim of collusion. (8/27/02 Tr. p. 248,279, 303) There has been no impropriety in reaching the Settlement Agreement facilitated by the mediation efforts of Chief Magistrate Judge John Roper. *See In re Catfish*, 939 F.Supp. at 497 (involvement of magistrate judge) *See also Holmes v. Trustmark National Bank, et al.*, Civil Action No. 1:95cv323BrR, Mem. Op. At 16 (that parties resolve differences and jointly seek court approval does not establish collusion) (citing *In re Asbestos Litigation*, 90 F.3d 963, 988 (5th Cir.1996)). Again, independent of the representations of counsel and the decision of objectors' counsel to abandon any claim of collusion, the Court has observed the conduct of class counsel vis a vis the conduct of defense counsel and has concluded that all negotiations have been at arms length and in the best interest of their respective clients insofar as such interest could be achieved within the contours of a fair, reasonable, adequate and arms length reapproachment.

B. Complexity, Expense and Likely Duration of the Litigation

The Court found in its 1998 certification opinion that "the amended complaint comprehensively challenges the practices followed by Tower and [American Federated] in the sale, financing and administration of credit property, life and disability insurance." As indicated below, these challenges raise important threshold legal questions associated with the significance of the defendants' written disclosures and defendants' affirmative duties. Any merits resolution of the

controversy would no doubt confront these issues. To the extent such issues were not resolved in defendants' favor as a matter of law, resolution of the class' broad challenges would result in complex, protracted litigation at considerable expense.

This controversy covers eight years of loans and insurance purchases and the determination of the defendants' business practices for the foreseeable future. Virtually every aspect of the business practices of Tower and American Federated is in issue. Discovery and trial would involve the depositions and testimony of numerous class members, Tower employees and American Federated employees. The parties would likely utilize State Department of Banking and Consumer Finance personnel, together with banking industry experts and consumer finance experts. Moreover, the parties would call upon State Department of Insurance personnel and insurance industry experts. Economists and accountants would be involved, and thousands of pages of documents maintained by Tower, American Federated, the Department of Banking and Consumer Finance and the Department of Insurance would likely be introduced into this action.

Continued litigation would be extremely expensive and lengthy. While considerable materials have been provided in formal and informal discovery, much additional discovery on the merits would likely be pursued. Discovery requests and production would be enormous. While the trial could proceed in stages, a comprehensive trial of all issues would unquestionably entail many weeks and at conclusion, appeals would be likely. The burdens on the parties and the courts would be extraordinary.

C. Probability of Plaintiffs' Success on the Merits

Notwithstanding the likely need for additional discovery required should this matter not be resolved amicably, the Court is of the opinion that sufficient evidence is in the record to enable the undersigned to come to a well founded conclusion on all issues presently before the Court including the assessment of the plaintiffs likelihood of success on the merits. In this regard the Court turns to the Fifth Circuit which has stated as follows, to wit:

> "the most important factor is the probability of the plaintiffs' success on the merits." *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828[, 103 S.Ct. 63, 74 L.Ed.2d 65] (1982). This view has its origin in the following argument: "If the settlement offer was grossly inadequate, as appellants contend, it can be inadequate only in light of the strength of the case presented by the plaintiffs. Naturally, they describe their offensive posture in glowing terms, sparing no superlatives, while the defendants show a similar lack of restraint in demeaning the value of plaintiffs' cause of action." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir.1974)(quoted by *Parker*, *supra*, 667 F.2d at 1209). "In Grinnell, because the plaintiffs' case was relatively weak, they settled in order to avoid the considerable risk that they would not be able to recover at all." *Id.* at 459.

Holmes, Mem. Op. At 18-19.

Similarly, we find the following language: "Courts judge the fairness of a proposed compromise by weighing the

plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement ... They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 (1981).

We begin by considering why the defendants would agree to settle if the defenses they offer are sound in law and fact. While it is not the business of this Court to critique the final resolution of State Court cases in certain counties in Mississippi including Jefferson and Claiborne counties which is the venue sought and chosen by a number of the objectors in this case, the undersigned sees no merit in ignoring the easily understood fear of the defense in having this class action decertified for whatever reason and having these issues resolved by a jury in one of these rural Mississippi counties where enormous verdicts are legend. In fact, the objectors point to these prodigious awards as all the more reason why this settlement is unfair. It is the argument of the objectors, that if they were allowed to proceed individually or flock together under Mississippi's liberal joinder rules, this settlement pales in comparison to what could be expected, based on well publicized State Court verdicts. While this contention is to be considered in regard to the reasonableness of the settlement, this Court also focuses on such a potential award as an explanation for the willingness of the defendants to settle at a time when they are insistent upon the viability of the defenses raised.

An evaluation of the legal claims begins with a review of the loan documentation executed by the class. Among other things, the loan disclosure statement provided the following:

INSURANCE

Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

TYPE	DEC C.L.	LVL C.L.	PREMIUM	SIGNATURE
Single Credit Life			$	I/We want credit life insurance Signature:
Joint Credit Life			$	
Credit Disability			$	I want credit disability insurance Signature:

You may obtain property insurance from anyone you want, provided the insurance company is acceptable to the creditor. If you get personal property insurance from or through the creditor, you will pay $_____
___Dual Interest ___Single Interest

The disclosure statement further set forth the cost of credit as an annual percentage rate, the dollar amount of the finance charge, the dollar amount being financed, the total monetary amount of payments to be made, the number or payments to be made and the amount of each payment.

The insurance application and authorization form commonly executed stipulated the following:

> I hereby make application to the above named company for insurance coverage(s) for a period equivalent to the term of my loan as described in the below schedule of coverage. The option has been extended to me to purchase this insurance from any company or agent of my choice or to assign policies which I currently possess, and I freely choose the company and agent to whom this application is made.
>
> The beneficiary under said coverage(s) shall be the finance company, to the extent of any indebtedness I may owe at the time of a claim due under the policy(s) with the remainder payable to the second beneficiary named below, or to my estate as respects any death benefit, and to myself as respects any

disability benefit.

The finance company is authorized to deduct from the proceeds of my note which I have given to them, the amount of the premium for such insurance and pay the premium to the insuring company.

....

_____ _____

Signature of Proposed Insured Debtor Date of Birth

Moreover, class members executed the following additional insurance disclosure form:

DO YOU WANT TO PURCHASE OPTIONAL CREDIT INSURANCE?

Tower Loan offers credit life, and accident and health insurance in connection with its loans. Purchase of this insurance [is] not required to obtain a loan with us. We are providing you with the following information to help you decide whether you want to buy this credit insurance.

Loan amount:

Your monthly payment without optional insurance:

Life Insurance premium:

Accident and Health insurance premium:

Your monthly payment with optional insurance:

TRUTH IN LENDING DISCLOSURE
Insurance

Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

Type	Premium	Signature

Credit Life Insurance — I want credit life

Signature_____

Credit Disability Insurance — I want credit disability

Signature_____

I do not want either Credit Life Insurance or Credit Disability Insurance. I acknowledge receiving a copy of this form.

Truth-in-Lending Act Claims

The amended complaint alleges Tower failed to comply with the Federal Truth-in-Lending Act, 15 U.S.C. §§ 1601 et seq. and the implementing Regulation Z, 12 C.F.R. Part 226. The Class Representatives assert Tower, through deceptive disclosure statements, wrongly failed to disclose to borrowers the amount of the insurance premiums and term of the insurance. Objectors contend Tower wrongly failed to include the cost of insurance in the annual percentage rate (APR). (Pam White objectors' brief at 15).

From the Court's view of the pleadings Tower's disclosures do not appear deceptive. The insurance "blocks" on the disclosure statement are conspicuously portrayed; the kind of insurance identified; the amount of the premium is specified; the borrower is required to sign separately each request for insurance at the specified cost to him. The insurance application and authorization form discloses the period of coverage. Tower uses the very forms suggested by Regulation Z. (Compare Reg. Z, app. H, form 10 with exh. P-2, 11/15/96 disclosure statement).

There is no requirement for inclusion of credit life or credit disability insurance premium costs in the APR when insurance purchase is not a condition of the loan. *See* 15 U.S.C. § 1605(b)(c), 12 C.F.R. § 226.4(a); *USLIFE Credit Corp. v. FTC*, 599 F.2d 1387 (5th Cir.1979); *Anthony v. Community Loan & Investment Corp.*, 559 F.2d 1363 (5th Cir.1977). Further the class members are arguing in the teeth of the repeated, express disclosures, disavowing any obligation but affording them the option to purchase such insurance. Based on Fifth Circuit decisions above cited, it appears that the

borrowers will have difficulty disclaiming the statements they have signed.

Similar principles apply to the noninclusion of property insurance premium costs in the APR. Under Regulation Z § 226.4(d)(2) property insurance premiums may be excluded from the finance charge if the following conditions are met: (i) the insurance coverage may be obtained from a person of the borrower's choice, and this fact is disclosed; and (ii) if the coverage is obtained through the creditor, the premium for the initial term of coverage is disclosed. Towers disclosure statement appears to satisfy both of these requisites.

Fair Debt Collection Practices Act Claims

The class contends Tower is a debt collector under the Fair Debt Collection Practices Act (FDCPA) and Tower's collection of allegedly fraudulent insurance premiums violated the act. The merits of this claim are questionable. The FDCPA applies to independent or third-party debt collectors, not generally to the actual creditor. *See* 15 U.S.C. § 1692(a)(6); *United States v. Central Adjustment Bureau, Inc.*, 823 F.2d 880, 880-81 (5th Cir.1987); *James v. Ford Motor Credit Co.*, 842 F.Supp. 1202, 1206-07 (D.Minn.1994), aff'd 47 F.3d 961 (8th Cir.1995). In a judicial setting Tower may be classified as something other than a "debt collector" under the FDCPA and in all likelihood is not subject to it. *See James*, 842 F.Supp. at 1206-07; *but cf. Holmes*, Mem. Op. at 26 ("at least an arguable dispute whether egregious cases involving bank's collection activities would fall under the FDCPA").

Antitrust Claims

The class alleges that defendants violated the antitrust

laws of the United States as set forth in Title 15 of the United States Code. They allege that "the defendants have conspired with one another and with other finance companies to promulgate the scheme of insurance fraud and in direct restraint of trade." In this regard, the United States Supreme Court has found that:

> There is ... general agreement that § 1 [of the Sherman Act] is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. Although this Court has not previously addressed the question, there can be little doubt that the operations of a corporate enterprise organized into divisions might judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.

Copperweld Corp. v. Independence Tube Corp. 467 U.S. 752, 770 (1984). The Court likewise found that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for the purpose of § 1 of

the Sherman Act." *Id.* at 771.

Tower and American Federated are wholly-owned subsidiaries of a common parent corporation, First Tower Corp. As such, they do not appear to constitute "two independent sources of economic power" sufficient to warrant Sherman Act scrutiny under the teachings of Copperweld. *See Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir.1984). No conduct of other finance companies in concert with Defendants appears to have been implicated here.[3]

Fiduciary Duty Claims

The amended complaint alleges "the relationship between the parties transcended a normal lender-borrower relationship." The class contends a fiduciary relationship arose "because plaintiffs placed special trust and confidence in defendant to obtain adequate insurance for the purposes contemplated at the prevailing market rate." On this alleged premise, the class argues Tower had various affirmative duties of disclosure and obligations to purchase insurance at reasonable rates.

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[3]The Class' other federal claims are plainly insubstantial. No private right of action exists for mail fraud (count XVI) under 18 U.S.C. § 1341, *See Bell v. Health-Mor, Inc.*, 549 F.2d 342 (5th Cir.1977). The Civil Rights Act of 1964, amended as the Civil Rights Act of 1991 (count XII), involves discrimination and has no apparent relationship to contentions actually being pursued here. The Class also cannot invoke the due process clause (count XII) against defendants because they are private entities. *See Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

Courts in this district have addressed virtually identical claims. In *Strong v. First Family Financial Services, Inc.*, 202 F.Supp.2d 536 (S.D.Miss.2002), the court first observed that "the Mississippi Supreme Court has repeatedly held that lenders and their borrowers typically are not in a fiduciary relationship, and certainly are not so as a matter of law, although 'the relationship between a debtor and creditor may rise to such a level of fiduciary based on the particular facts of the case.' " *Id.* at 541. The court found:

> In the case at bar, plaintiffs allege that a fiduciary relationship arose because defendants purported to obtain insurance on plaintiffs' behalf in connection with plaintiffs' respective loans and plaintiffs thus "placed special trust and confidence in their lender" to obtain adequate insurance at a fair price. But this is nothing more than an assertion that plaintiffs trusted their lender (and by inference, its employees) because it was their lender, which is plainly insufficient under the cited authorities to support finding that a fiduciary relationship existed.

Id. at 542. To the same effect are *Ross v. First Family Financial Services, Inc.*, 2002 WL 31059582 (N.D.Miss.); *Conner v. First Family Financial Services, Inc.*, 2002 WL 31056778 (N.D.Miss.); and *Howard v. CitiFinancial, Inc.*, 195 F.Supp.2d 811, 823 (S.D.Miss.2002) *See also Baldwin v. Laurel Ford Lincoln-Mercury, Inc.*, 32 F.Supp.2d 894, 898 (S.D.Miss.1998) (borrower cannot "assume that the resulting deal would be 'the best possible' arrangement without doing her homework").

The above district court decisions are persuasive. They appear to be applicable. Consequently, the likelihood of class success on their claims of fiduciary duty appears questionable.

Implied Covenant of Good Faith and Fair Dealing Claims

The amended complaint alleges Tower breached an implied duty of good faith and fair dealing through deceptively providing inadequate insurance at excessive prices and charging exorbitant interest rates. The complaint alleges the class members purportedly believed that "if" Tower purchased insurance, the premiums and interest charged would be reasonable. The suggestions that Tower, after the execution of the contract, undertook to obtain insurance does not appear to square with the facts. At the time of execution of the promissory note and other contractual documents, the borrower purchased the insurance for the contractually specified premium costs and at the contractually specified interest rate. The class contests the bases on which they contracted, not Tower's subsequent performance of the contract.

Under Mississippi law, "[a]ll contracts contain an implied covenant of good faith and fair dealing in performance and enforcement." *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss.1992) *See also, e.g., General Motors Acceptance Corporation v. Baymon*, 732 So.2d 262, 269 (Miss.1999) (GMAC). The covenant runs, however, with respect to the "performance and enforcement" of the contract, not to its negotiation or formation. *Howard*, 195 F.Supp.2d at 824; *Baldwin*, 32 F.Supp.2d at 899.

As recognized above and found in *Howard*, allegations of breach of the implied covenant based on "obtaining inadequate insurance" and making "exorbitant" charges for it "go to the

formation of the contract, rather than the performance and enforcement of the contract:". *Howard*, 195 F.Supp.2d at 824. Thus, without addressing the merits of the actual charges which will be addressed further below, it appears that the prospects for class success on a claim related to the implied covenant of good faith and fair dealing are again questionable.

Fraudulent and Deceptive Practices Claims

The class advances a variety of challenges to the lending and insurance practices of Tower and American Federated under the broad rubric of "fraudulent misrepresentation and/or omission" and "consumer fraud and deceptive business practices." The class complains Tower wrongfully forced them to purchase credit insurance. Otherwise, their challenges principally attack the amount of the premium charges, the amount of the finance charges, and the undisclosed affiliate relationship between Tower and American Federated.

Preliminarily, it should be noted that the allegations of fraudulent conduct are essentially predicated not on what Tower representatives allegedly affirmatively misrepresented but rather on what defendants allegedly failed to disclose. Yet, "silence, in the absence of a duty to speak, is not actionable." *Strong*, 202 F.Supp.2d at 540. *See Harrison v. Commercial Credit Corp.*,2002 WL 548281, *2 (S.D.Miss.).

"One who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.' " *Chiarella v. U.S.*, 445 U.S.

222, 228, 100 S.Ct. 1108, 63 L.Ed.2d 348(1980) (cited and followed in *Strong*). The significant impediment to plaintiff establishment of a fiduciary or comparable relationship having been noted above, similar substantial barriers exist to successful claims of fraudulent omission.

To the extent affirmative disclosures may have been required, Tower and American Federated have strong arguments that such disclosures were adequately made. Furthermore, class criticism of the charges imposed appears to headlong into defendants' compliance with applicable statutes and regulations.

Allegations of Forced Purchase of Insurance

The contention that borrowers were required to purchase insurance to obtain a loan directly contradicts defendants' numerous written disclosures specifically acknowledged in writing by the borrowers themselves. The written disclosures of Tower and American Federated repeatedly informed borrowers that credit life and credit disability insurance were optional. While property insurance was required, borrowers were advised they could obtain property insurance through the insurer of their choice; defendants' disclosures advised borrowers they were not required to purchase insurance through Tower or American Federated.

The threshold question is whether the class members may withdraw from the contracts they signed. Mississippi law generally does not permit a contracting party to assert oral misrepresentations to avoid the plain provisions of the written contract. *E.g.*, *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So.2d 1254,

1257 (Miss.1991)

On at least two instances, courts in this district have addressed borrower allegations of being required to purchase insurance even though contractual documents stated just the opposite. *See Strong*, 202 F.Supp.2d at 543- 44; *Howard*, 195 F.Supp.2d at 820-21. The court in Strong, in rejecting borrower allegations of required insurance purchase and upholding the sufficiency of the written disclosures, stated:

> "[A] person is under an obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract," *Godfrey, Bassett v. Huntington Lumber and Supply Co.*, 584 So.2d 1254, 1257 (Miss.1991), regardless of whether or not he actually read the document. *See Cherry v. Anthony Gibbs*, Sage, 501 So.2d 416, 419 (Miss.1987) (stating that "knowledge of [the contents of a contract] [will] be imputed to [a party] as a matter of law" even though she did not read the contract before signing it) citing *Atlas Roofing Mfg. Co., Inc., v. Robinson and Julienne, Inc.*, 279 So.2d 625, 629 (Miss.1973); *see also Warrington v. Dawson*, 798 F.2d 1533, 1544 n. 10 (5th Cir.1986) ("The 'generally prevailing law' is that 'one is presumed to have read a contract that one signs.' "). The fact that the loan and insurance documents executed by plaintiffs conspicuously and clearly disclose that credit insurance was not required as a condition for plaintiffs' loans precludes any reasonable possibility of recovery

> by plaintiffs on their claims against the resident defendants based on allegations that defendants failed to disclose that credit insurance was not required or that they misrepresented that such insurance was required as a condition to obtaining their loan. *Cf. Carter v. Union Security* (holding that plaintiff's alleged reliance on agent's alleged representation that credit insurance was necessary was, as a matter of law, not reasonable since the uncontroverted evidence demonstrated that the terms of the contract were made available to and read by the insured.)

202 F.Supp.2d at 543-44. The court's treatment in *Howard* of such issues is essentially the same. *See Howard*, 195 F.Supp.2d at 820-22, 825. Similar circumstances here argue that this Court should do likewise.

Alleged Excessive Insurance Premiums

Miss.Code Ann. § 83-53-23 establishes the premiums that may be charged for credit life and credit disability insurance. The statute deems rates consistent with the statutory structure to be reasonable. Defendants set the subject rates and charged premiums in accordance with this regulatory environment in which they operated. (Parker, 8/27/02 Tr. p. 86-87; Parham, 8/27/02 Tr. p. 182-87; exh. D-5)

The regulations promulgated by the Mississippi Department of Banking and Consumer Finance concerning small loan companies sanction charges to borrowers for property insurance premiums. They also delineate other terms governing the provision of property insurance. (Exh. D-49,

D-50, D-51) Tower's practices appear to have been consistent with these regulations. (Parker, 8/27/02 Tr. p. 87; Parham, 8/27/02 Tr. p. 182-87; exh. D-5)

In addition to the rates, the Class complains Tower sells the property insurance based on inflated values of the loan collateral. This issue, too, is covered by state regulation. The borrowers affirmatively represent the value of the personal property to Tower in their promissory notes and security agreements. (Exh. P-2, P-3) The state regulations stipulate "the licensee may rely on borrower's representation of the value of the personal property." (Exh. D-49, § 4(a); exh. D-50, § 7(a); exh. D-51, § 4(a))

"Under the filed rate doctrine, any 'filed rate'--that is, a rate approved by the governing regulatory agency--is 'per se reasonable and unassailable in judicial proceedings brought by rate payers.' " *American Bankers' Ins. Co. of Florida v. Wells*, 819 So.2d 1196, 1203-04 (Miss.2001) (citation omitted). Thus, borrower allegations of excessive rates, or challenges of the "rates and terms" of the governmentally-approved insurance contracts, are barred by the filed rate doctrine. *Id.* at 1205. *See Strong*, 202 F.Supp.2d at 545 (following *American Bankers* and rejecting claims of "inadequate" and "grossly overpriced" insurance).

Tower is required to conduct its business pursuant to applicable statutes and regulations and, accordingly, should be protected by law when it complies with these statutes and regulations. *See, e.g., Cappaert v. Bierman*, 339 So.2d 1355, 1357 (Miss.1976); *Deposit Guaranty Bank & Trust Company v. Williams*, 9 So.2d 638, 639-40 (1942). Such protection appears appropriate here.

Alleged Excessive Finance Charges.

That the finance charges imposed by Tower as a small loan company may appear high when compared to rates traditionally charged by banks does not make them excessive or unlawful. *Miss.Code Ann.* § 75-17-21 sets forth the allowable finance charges and closing fees. Tower's charges and fees appear to fall within the statutorily-approved rates. (Parker, 8/27/02 Tr. p. 85-86)

The Undisclosed Affiliate Relationship Between Tower and American Federated.

Tower and American Federated are both wholly-owned subsidiaries of First Tower Corp. On this basis, the Class characterizes American Federated as a "captive insurer." The Class complains about American Federated payment of commissions to Tower employees, describing them as "kickbacks." The Class maintains the undisclosed, "secret" relationship between Tower and American Federated constitutes an unlawful deceptive practice.

Yet, purchase of insurance from an entity affiliated with the lender does not appear to be prohibited by law. Clearly, insurer payment of commissions on credit life and disability insurance is statutorily sanctioned. *See* Miss.Code Ann. § 83-53-25. The argument that the receipt of commissions encourages the marketing of insurance has little probative value.

Tower disclosed the insurance coverage and the premium rates, both of which complied with state laws and regulations. Such disclosures, rather than explanation of commission payment practices, would appear to be all that is

required. *See Baldwin*, 32 F.Supp.2d at 899-900 (borrower furnished with terms of bargain free to accept or reject but not permitted to challenge commission relationship between entities). Further, even if there were an arguable duty of affirmative disclosure of the affiliate relationship, nondisclosure does not appear to have caused any injury. *See GMAC*, 732 So.2d at 270 (no fraud associated with failure to disclose parent-subsidiary relationship between lender and insurer where, among other things, no injury resulted).

Negligence Claims

The Class recasts much of the conduct alleged to be fraudulent or deceptive in allegations of negligence. (Exh. D-1, counts IV & VIII) To the extent the Class alleges negligent failures to disclose, the question is essentially the same as addressed in the context of alleged fiduciary duties and fraudulent omissions. "[T]he failure to act where there is no duty to act is not negligence." *Howard*, 195 F.Supp.2d at 825. Thus, it is questionable as to whether the plaintiffs could be successful in their negligence claims associated with the defendants' failure to act affirmatively through greater disclosures or securement of allegedly better or more favorably priced insurance.

It is also not necessary to address again issues of excess insurance premium and finance charges. The negligence allegations also include, however, challenges to insurance premium refund practices associated with use of the Rule of 78ths. (Exh. D-1, ¶ 85) Yet, as with setting the premium rates themselves, refund practices, too, are dictated by statute.

The Rule of 78ths is also known as the "sum of the digits" method. *See Miss.Code Ann.* § 75-67-127(1)(c).

Miss.Code Ann.§ 83-53-17(2) requires the use of the " 'sum of the digits' formula" on refunds for decreasing term credit life insurance and all credit disability insurance. The small loan company regulations require refunds of unearned premiums for property insurance to be "calculated under the Rule of 78ths, unless the policy calls for a greater refund amount." (Exh. D-49, § 4(e)) Only level term credit life insurance is to be refunded "pro rata." *See Miss.Code Ann.* § 83-53-17(2). The record suggests Tower and American Federated have complied with the statutory and regulatory requisites. (Parker, 8/27/02 Tr. p. 87-88; Parham, 8/27/02 Tr. p. 182-87)

Flipping Claims

Count XVII of the amended complaint (Exh. D-1) "charges that the Defendants have been guilty of 'flipping.' " The Class thereby challenges Tower's practice of allowing customers to renew existing loans when borrowing additional funds or extending the terms of repayment. There does not appear to be any rule of Mississippi law prohibiting such renewals. So long as Tower properly refunds unearned finance charges and insurance premiums, Tower does not appear to be precluded from allowing borrowers opportunities to refinance their existing loans.

The Class apparently charges that Tower's "flipping" of loans unlawfully increases the costs of borrowing. Yet, complaints that Tower improperly profits through unfair finance charge and insurance refund practices appear unavailing, inasmuch as refund methods are mandated by law. Further, Mississippi's finance charge statute (§ 75-17-21) contains a tiered structure permitting higher annual percentage rates for smaller loans than larger loans. *Miss.Code Ann.* § 75-17-29 prohibits lenders from making multiple loans with the

intent to obtain higher finance charges. If lenders were not prohibited from making multiple loans, and if borrowers were not allowed to renew or consolidate their loans, small loan companies could manipulate the tiered structure of § 75-17-21. Plaintiffs' allegations of "flipping" appear to conflict with legislative provisions designed for their protection. (Parker, 8/27/02 Tr. p. 88-89)

Regulatory Claims.

The Class alleges Tower has violated the Mississippi small loan regulatory law and related regulations of the Department of Banking and Consumer Finance. (Exh. D-1, count XIV) Allegations concerning excessive charges, refunds, false disclosure statements and solicitation practices have been specifically addressed previously. (P. 31, 37-42, 43-44, *supra*) The other allegations do not appear to be supported by the record and otherwise appear largely inconsequential. (Parker, 8/27/02 Tr. p. 84-89; Parham, 8/27/02 Tr. p. 182- 87)

Summary of Claims

While not every allegation in the lengthy amended complaint has been discussed, the Court has addressed the essence of the claims. The Court has considered those claims which the submissions of class counsel, defendants and objectors indicate should be evaluated in an assessment of the settlement. The Court emphasizes that it has not, in this appraisement, resolved the merits of any claim nor is it this Court's mission to do so at this stage of the proceedings. The inquiry here is to critique the probability of the plaintiffs' success on the merits, mandated by the six facets of determination espoused by the Fifth Circuit. (*See Reed v. General Motors Corp., Supra)* Thus, with a view toward being

open minded in the event this matter is resubmitted to this Court for further determination but within the required parameter of assessing the viability of claims asserted by the plaintiff, it is very apparent to this Court that the class would face significant barriers in pursuit of a favorable judgment on the merits.[4] In fact, at one time in these voluminous proceedings the Court recalls asking counsel to explain with brevity and clarity how the defendants, in their lending practices, deviated from statutory law. The Court has not researched the record to revisit the exact question or answer, but the Court's impression of the case then, as now, is such that we return to the issue of why are the defendants willing to compromise. In part the answer, no doubt, lies in the observation appearing on page 30 above.

Range of Possible Recovery

"One method of assessing the possible range of recovery is to juxtapose the relief sought in the complaint realistically against that provided by the settlement. To some extent it is within this context that the Court considers this fifth facet mandated by the Fifth Circuit in Reed. Should this case go to trial, the range of possible recovery, by any fair minded estimate, would not rise to the level of equitable relief granted to the class by the Settlement.

Equitable Relief

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[4]These barriers obviously suggest significant problems with the "Class" claim for punitive damages. The issue of punitive damages is addressed further below in the context of range of relief available to the Class. (P.53-57, *infra*)

The Class maintains they have no adequate remedy at law. Therefore, they seek injunctive relief enjoining the Defendants from engaging in the challenged practices associated with the making of loans and procurement of insurance for Class Members and future borrowers. Among other things, the Class specifically requests "a court order requiring the Defendants to terminate all 'packing' of credit life, credit disability and property insurance unless and until the proposed plan is submitted to and approved by the court." (Exh. D-1, ¶ 116(h))

The Class' claims focus on allegedly deceptive, coercive and inadequate disclosures concerning the provision of insurance. Much of the claims revolves around alleged defendant failures to affirmatively assure the Class Members are told all material aspects of the loans and insurance transactions. The Class seeks to eliminate allegedly deceptive marketing practices and insurance "packing" through judicial delineation of comprehensive business practices. They ask the Court to delineate practices which assure the borrower's choice of insurance is truly real and the borrower understands as much as possible about the implications of the financial transaction in which he or she is participating.

To accomplish these objectives, Class Counsel has negotiated substantial equitable relief which exceeds any relief this Court would in all likelihood award. The injunctive relief goes far beyond judicially mandated use of a single prescribed disclosure statement and insurance application and authorization form.

For example, the Settlement Agreement requires delivery to the borrower of a comprehensive separate written statement entitled **"LOAN AND INSURANCE**

INFORMATION." (Exh. D-47, Exh. A) This statement emphasizes the significance of borrowing money, describes the fundamental components of the loan transaction and relates all material aspects of available insurance alternatives. The insurance information description begins with the following reminder, again in bold-faced, all capital letters:

> **YOU DO NOT HAVE TO BUY CREDIT LIFE INSURANCE OR CREDIT ACCIDENT AND HEALTH INSURANCE TO GET A LOAN FROM US. IF YOU WANT INSURANCE, YOU HAVE THE RIGHT TO CHOOSE ANY INSURANCE AGENT OR COMPANY QUALIFIED TO DO BUSINESS IN MISSISSIPPI.**

(Exh. D-47, exh. A, p. 4)

Multiple other separate disclosures address the optional nature of credit life and disability insurance and borrowers' rights not to buy property insurance through Tower. (Exh. D-47, Exh. B, C, E) A sign is to be conspicuously posted in the lobby of every Tower office declaring borrower rights concerning insurance. (Exh. D-47, Exh. E) Separate disclosures addressing alternative loan maturities and the associated monthly payments are to be provided. (Exh. D-47, Exh. F) Maximum allowable values on loan collateral for personal property insurance are to be established and disclosed to the borrower. (Exh. D-47, Exh. H) A borrower certification that the loan collateral is not already insured and the represented values are correct is to be utilized. (Exh. D-47, Exh. I)

Numerous other remedial measures involving loan

documentation preparation, the provision of insurance, loan renewal practices, premium refunds, and improved loan collateral policies are among the equitable relief provisions. As described by the former Commissioner of the Department of Banking and Finance, the injunctive relief provisions in the Settlement Agreement constitute "a model for better business practices for the entire [small loan company] industry." (Parham, 8/27/02 Tr. p. 196) Indeed, the former Commissioner insisted the Settlement Agreement "obligated Tower ... to go above and beyond what is actually required by present Mississippi law." (Parham, 8/27/02 Tr. p. 190; see Parker, 8/27/02 Tr. p. 102) Such an assertion is not without merit.

The Class urges the Court to direct such equitable relief not only for their own benefit but also for the benefit of future borrowers. Small loan companies render an important service to Mississippi citizens. (Parham, 8/27/02 Tr. p. 187) They afford credit opportunities to consumers generally characterized by low income and marginal credit records. Commercial banks do not generally serve such clientele. Apart from small loan companies, these persons are largely left with lenders of last resort such as check cashers, car title lenders and pawn shops whose charges are traditionally much higher than those of small loan companies. (Parham, 8/27/02 Tr. p. 187-89)

Settlement evaluation includes assessment of the benefit to the existing Class of the prospective equitable relief. The benefits here, while in many respects immeasurable, are significant. The vast majority of the Class are, or will be, repeat borrowers. Approximately 60% of the Class are already repeat borrowers. (Exh. D-47, p. 30, n. 3-4) Over 75% of Tower borrowers are estimated to borrow within four years of their initial loan and approximately 80% will reborrow within eight years. (Exh. D-37, ¶ 7) The equitable remedies here will

be constant reminders to the Class of the terms and implications of the debtor-creditor relationships into which they are entering.

Compensatory Damages

The Class predicates their claim for compensatory damages on the amount of insurance premiums and associated charges paid. The amended complaint includes counts seeking restitution, demanding disgorgement and claiming unjust enrichment of Defendants. (Exh. D-1, counts X, XI; prayer for relief) The Class specifically requests "a court order requiring Defendants to refund to plaintiff and all Class Members all premiums and related charges made to Defendants or its agents." (Exh. D-1, ¶ 116(d)) Thus, the compensatory damages here are themselves in the nature of an equitable remedy. (9/9/98 class certification opinion, exh. D-20, p. 19-20)

The Settlement Agreement provides for over $2.2 million in compensatory damages, not an inconsiderable sum. Further, this amount is less than one-third of Defendants' out-of-pocket monetary obligations under the Settlement. Also, this $2.2 million does not take into account the substantial amounts of undisputed lawful loan charges which Tower will forego under the equitable relief which restructures its future operations. (Exh. D-47, p. 13-28) The apparent strength of Defendants' defenses based on the disclosure statements and insurance authorization forms notwithstanding, Tower and American Federated have agreed to make a multimillion dollar payment in settlement without first testing these defenses.

The Class' TILA claims seek to recover damages for alleged disclosure failures related to insurance costs and terms. Any actual damages would appear to be no different than the state law demands for insurance premium refunds. Statutory

damages under TILA are capped in class actions at the lesser of $500,000 or one percent of the creditor-defendant's net worth. *See* 15 U.S.C. § 1640(a)(2)(B). Defendants' consolidated net worth being greater than $50,000,000, the $500,000 cap applies. The compensatory payment under the Settlement obviously exceeds that amount.

At the same time, however, the $2.2 million amount is less than 10% of the net premium paid by the Class over the relevant period. (Exh. D-56) It also results in individual payments to Class Members of less than $30. Were the Class to prevail on their state law claims, the total monetary payout and individual payments would likely be several multiples of these amounts. Even so, it does not follow that these amounts are unreasonably low in the big picture of this settlement resolution. Reasonableness is not to be evaluated in isolation. Other monetary payments are to be made, and there is an overburden of substantial equitable relief which is not dependent on monetary payments.

Punitive Damages

The Settlement Agreement provides for the payment of approximately $4.4 million in punitive damages. While payments are structured for distribution to individual Class Members with repeat borrowers to receive a larger share, the Court's principal concern is the total amount. The Court evaluates the $4.4 million largely in the context of the reprehensibility of the Defendants' alleged conduct and Defendants' net worth.

The Fifth Circuit has capsulized the purpose of punitive damages in Mississippi this way:

Punitive damages punish. The almost unanimous rule is that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67, 101 S.Ct. 2748, 2759, 69 L.Ed.2d 616 (1981).

Mississippi's controlling law on punitive damages follows the majority rule. According to the Mississippi Supreme Court, a reasonable instruction on the state's law of punitive damages is as follows:

> Punitive damages are added damages awarded for public service in bringing a wrongdoer to account, as an example to warn and deter others from repeating the same act. They are never awarded to benefit the injured party or as a matter of right, but rather to punish and to compel the wrongdoer to have due and proper regard for the rights of the public.

McGowan v. Estate of Wright, 524 So.2d 308, 310 (Miss.1988); *see also Wesson v. United States*, 48 F.3d 894, 899-900 (5th Cir.1995) (examining nature of punitive damages under

> Mississippi law). Mississippi's legislature recently codified this view of the law, fully effective as of July 1, 1994. See *Miss.Code Ann.* § 11-1-65 (Supp.1994).

Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1332-33 (5th Cir.1995).

In assessing as to whether this case represents issues which, if allowed to be considered by a jury, would rise to a level which would justify an award of punitive damages, we are mindful of the position of the objectors which is that juries in specified counties of Mississippi have been most charitable in their awards made to exact punishment upon various defendants. And in our overall assessment of the range of possible recovery by the plaintiffs, these awards are relevant although conjectural. We are dealing in this case with a highly regulated industry. The Legislature has statutorily established the interest rates under attack, and the Legislature has statutorily authorized the sale of credit life, disability and property insurance. The Legislature has statutorily dictated the premiums to be paid, the commissions which may be received and the refund practices for credit life and disability insurance. The State Department of Banking and Consumer Finance and the State Department of Insurance oversee and regulate virtually every aspect of this industry.

Consequently, the allegations of class members, as visceral as they may sound, begin to diminish under scrutiny. Defendants in these kinds of cases should not be liable for punitive damages for conduct consistent with state statutes and regulations. *See Tew v. Dixieland Finance, Inc.*, 527 So.2d 665, 673 (Miss.1988) (licensee not liable for actions taken in good faith reliance on Regulations of Department of Banking

and Consumer Finance); *Frazier v. State ex rel. Pittman*, 504 So.2d 675, 704 (Miss.1987) (no bad faith when party acts in reliance on statute); *Miss.Code Ann.* §§ 75-67-137, 75-67-245; Regulations, State Department of Banking and Consumer Finance (Exh. D-49, § 20; Exh. D-51, § 13).

This is not to discount the arguments made by the plaintiffs which claim that the loan and insurance disclosures are inadequate; and that the marketing practices are impermissible; this is only to say that there seems to be substantial support for the Defendants' position that the Class as well as the objectors seek to pounce upon the unpopularity of an industry which imposes legally permissible high rates with a view towards success notwithstanding the lawfulness of the Defendants' activities. Should the class members in this case be put to their proof punitive damages are far from a given.

On the other hand, however, punitive damages here are considered in light of Defendants' net worth. The net worth of First Tower Corp. as of December 31, 2001 was $68,913,892. (Richards, 8/27/02 Tr. p. 215-16) First Tower Corp. is the parent corporation of Tower and American Federated. The approximately $69 million constitutes the consolidated net worth of the various loan and insurance entities. Thus, the $4.4 million in proposed punitive damages represents about 6.5% of Defendants' net worth.

In *Mutual Life Ins. Co. of New York v. Wesson*, 517 So.2d 521, 530-33 (Miss.1987), the Mississippi Supreme Court addressed the amount of a punitive damages award where, unlike here, the evidence was "overwhelming" that MONY had no arguable, legitimate or justifiable reason for its conduct and was grossly negligent. *Id.* at 528. MONY's assets were over $8

billion and its net worth was some $445 million. The Court reduced an $8,000,000 punitive damages award to $1,500,000 (.33487% of MONY's net worth).[5] The Settlement amount here of $4.4 million (6.5% of net worth) in an action largely involving compliance with governmental guidelines and not involving terrible personal injuries, is well within any arguable zone of reasonableness.[6]

Opinions of Persons Involved

A number of persons have objected to the proposed Settlement. (P. 17- 20, *supra*) Although the Court does not discount the substance of these objections proportionately to their exceedingly small number, the Court does recognize that the objectors comprise only approximately 1.2% of the Class. Even so, as said, a proper evaluation of the Settlement must be

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[5]The court in *MONY* took the opportunity to point to cases in Texas and California where "the awards were for terrible personal injuries sustained by the victims." 517 So.2d at 533. In the California case, *Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 348, 119 Cal.App.3d 757 (1981), the punitive award of $3.5 million was approximately .005% of Ford's net worth. "Ford's tortious [reprehensible] conduct endangered the lives of thousands of Pinto purchasers." 119 Cal.App.3d at 819.

[6]Recent action of the Mississippi Legislature reinforces observations of favorable treatment of the Class here. While not controlling in this action commenced before passage of the legislation, the Legislature has imposed a cap on punitive damages exposure for companies the size of First Tower Corp. of $5,000,000. See House Bill No. 19, Civil Justice Reform, § 6; December 3, 2002.

made and is herein made to insure the protection all Class Members, including objectors. Consideration of who made the objections is also appropriate.

The objectors essentially assert three objections to the Settlement. First, they oppose the mandatory class aspects of the Settlement and many have moved for leave to "opt out" of the Class. Second, objectors contend the injunctive relief under the Settlement is meaningless. Third, they maintain the monetary payments under the Settlement, both as to compensatory and punitive damages, are inadequate.[7]

The appropriateness of mandatory participation will be subsequently addressed in the context of further consideration of class certification as contrasted with the reasonableness of the Settlement. (P.70 *et seq., infra*) The lack of merit in the objectors' challenges to the equitable relief and monetary payments under the Settlement is explained below.

Equitable Relief

Objectors contend the injunctive relief under the Settlement Agreement is not substantial. (Docket No. 151, p. 2; Docket No. 154, p. 3) They contend that because the relief "merely forces" Tower and American Federated to "follow the

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[7]Objectors' submissions also contest the mode, content and general adequacy of the Notice of Settlement provided the Class. The challenges appear, however, largely perfunctory, and notice issues have already been adequately addressed. (P. 12-16; P. 22-24, *supra*) Several objectors do raise circumstances peculiar to them which will be addressed in due course.

law," it is, therefore, a "farce." The Court views this matter differently. The Plaintiffs maintain that the Defendants have failed to abide by the legal requirements for this highly regulated industry, which allegations the Defendants deny. The injunctive relief granted by the settlement removes any lack of clarity and establishes firm rules which the Defendants must follow in the future; moreover the injunctive relief appears to go far beyond the February 10, 1992, Federal Trade Commission decision and order which has been referenced by the objectors.

Moreover, it is noteworthy that the objectors have, themselves, specifically asked five different state courts to craft a court-ordered plan establishing future procedures for insurance placement. (Exh. D-3(a) thru D-3(k), count XII) Further, identical demands were made in the *Bryant Jones* complaint. (Exh. D-41, count XVIV) Having independently investigated the various settlement documents in the *Bryant Jones* case, the undersigned recalls that a significant part of the settlement involved future court-ordered loan insurance practices for Defendants. (*Parker*, 8/27/02 Tr. p. 73)

Thus, Judicial clarification and delineation of lawful business practices are both desirable and necessary in this proceeding and are sought by the Class. The judicial mandate of comprehensive practices to better inform borrowers is meaningful. Not only does the Court deem these future standards of conduct to be of importance, but the class representatives have argued ad nauseam that because most of them are repeat customers, these requirements of the lender constitute the gravamen of the relief which they have sought from the beginning.

Monetary Payments

Objectors contend that the combined payments for compensatory and punitive damages of less than $100 per Class Member are unreasonably low. In support of this assertion, however, they have failed to adequately address the legal merits of the borrower's claims. Again, in support of their position of inadequacy, they remind the court of other verdicts which have been referenced heretofore in this opinion.

Mindful of their claim that the Settlement "dramatically undervalues the absent Class Members' claims," (Docket No. 152, ¶ 4) the Court awaited testimony and other evidence at the various hearings to assist the Court in evaluating every aspect of this case. Although there was testimony from counsel, no objector testified. Other than as mentioned hereinbefore, there were no witnesses called at the fairness hearings. There were only a small number of affidavits submitted. These affidavits appear to afford no basis for the Court to criticize the written disclosures made by the Defendants. There is no case made by the objectors which suggest an arguable basis for compensatory monetary payments greater than the insurance premiums and charges associated with the loan.[8] Objectors' counsel contend the compensatory claims are very small, speculating (with some hyperbole) they "range from ... maybe a couple of hundred dollars to maybe several thousands of dollars." (8/27/02 Tr. p. 286)

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[8]The affidavit of Mary Agee does state she "attempted to file a claim on [her] disability insurance coverage" and "said claim was denied." (Exh. P-1(a), 9/20/01 hearing) Alleged wrongful denial of claimed insurance benefits is not, however, a subject of this class action proceeding. (*See* P. 61,62, *infra*)

Objectors assert the same claims as the Class. (P. 1-4, *supra*) Without citation of legal authority, objectors emphasize two purported causes of action for the conduct of which they complain. First, they argue Defendants' practices are in "violation of the duty of good faith and fair dealing." (8/27/02 Tr. p. 298) Like the Class' claims, however, the conduct of which objectors complain occurred at the time of entering the contractual relationship. No such implied duty or covenant existed at that time. (P.36, 37)

Otherwise, objectors argue Defendants' practices constitute "fraud; just plain ole common-law fraud." (8/27/02 Tr. p. 298) Objectors never offered any evidence, however, distinguishing their claim from the various fraudulent practices claims of the Class. Nothing specified about the objectors' claims suggests they are of any greater value than those of the Class. (*See* discussion of merits of Class claims, 27-45, *supra*)

Although this Court has sought a benchmark from which the viability of the claims against Tower could be compared and judged, the suggestion by the objectors that legitimate comparisons could be made to other trials in specified venues is flawed for the reason that this Court could not be expected to independently investigate every state court action mentioned by affidavit or in other submissions by counsel for the objecting parties. The undersigned is aware from the objectors' presentations that a "full jury trial" in an action in Circuit Court in Holmes County, Mississippi was fruitful from the standpoint of the plaintiff. But a generic reference to other cases involving finance companies and financial issues without more specificity from which comparisons can be made, has little probative value. As an example, the purported awards of punitive damages of $3 million each to 23 plaintiffs for a total of $69 million has little

influence upon this Court without a more definitive comparison of the issues. What was the net worth of the defendant? What are the facts? It could be argued that references to such awards are far more supportive of the fairness of the Settlement, and the Rule 23(b)(1)(A) certification than they are for the proposition that the Settlement is unfair and unreasonable.

Scope of the Release

Objector Christine Brooks seeks to be excluded from the Settlement and to opt out of the Class because she maintains she has a claim for bad faith failure to pay insurance benefits. (8/27/02 Tr. p. 271-76) Objectors' counsel for the Pam White group argued Class Members are wrongly being required to release claims of wrongful repossession and wrongful foreclosure. (8/27/02 Tr. p. 252) These objections raise issues concerning the scope of the release of claims in light of the class certification.

The class certified is defined to include persons who paid premiums to American Federated for insurance associated with loans made by Tower. Ms. Brooks and the Pam White group are members of the Class. The amended complaint, however, does not plead claims for alleged bad faith denial of insurance benefits. Nor does it allege claims for wrongful repossession or foreclosure on loan collateral. The state court actions of Brooks and the Pam White group, however, have been properly enjoined because they contain direct challenges of the sale and costs of credit insurance.

While her contentions do not warrant her exclusion from the Class, the assertions of Brooks do justify scrutiny of the scope of the release contained in the Settlement Agreement. The release language (exh. D-47, p. 36-37) is understandably

broad. It may, however, be too broad. The release properly addresses claims in any way related to the allegations of the complaint and also includes claims that "relate in any way to the Tower Loan Companies' loan/insurance practices." Clarification appears clearly warranted, however, to assure that any claims against American Federated for wrongful failure to pay insurance benefits are not barred for being "related to the Tower Loan Companies' loan/insurance practices."

Release modification is not warranted for wrongful repossession or foreclosure claims. No objector with any such claim has been specifically identified. Presumably, the claims postulated by counsel are for allegedly unlawful collection practices and do not challenge the lawfulness of credit insurance placement or charges. Consequently, they would not relate to the allegations of the complaint. Release clarification is not necessary, for such claims would not be barred by the release as presently drafted.

Special Payments and Attorney's Fees

Given the somewhat atypical procedural history of this controversy, the Settlement Agreement provides for special payments to Class Members other than the present Class Representatives Claudia Smith Love and Wilbert Walker. (Exh. D-47, p. 30-31) The Agreement also permits, but does not require, the Court to allocate a portion of the attorneys' fees award to counsel other than present Class Counsel. (Exh. D-47, p. 29)

Special Payments

The Settlement Agreement directs special payments to Class Members who have acted in one of three capacities: (i)

Class Representatives in this action; (ii) Class Representative in the *Bryant Jones* action; or (iii) plaintiff in an individual action stayed by court order in the *Bryant Jones* action. Class Representatives in this action or *Bryant Jones* are to receive $2,500 each. The plaintiffs in individual actions are to receive $1,000 each. The total dollar amount set aside for these payments is $45,500. (Exh. D-47, p. 30-31)

Courts commonly permit payments to class representatives above those received in settlement by class members generally. Such payments, however, must be reasonable in light of applicable circumstances, and not "unfair" to other class members. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1152 (8th Cir.1999) (approval of incentive payment to class representative); *In re Catfish*, 939 F.Supp. at 503-04 (not unusual to make incentive awards to class representatives).

Bryant Jones commenced the original action against Tower and American Federated, and the Class Representative in that case initiated discovery as well as the initial framework for settlement purposes. Other plaintiffs who pursued state court actions also contributed to the settlement. Consequently, recognition of these persons in the Settlement Agreement in this case is appropriate.

The amounts of the special payments to the Class Representatives and state court plaintiffs are reasonable. There is no unfair disparate treatment of other Class Members. Payment of these special payments under the Settlement Agreement will have no significant effect on the individual amounts distributable to other Class Members.

Attorneys' Fees

When final according to its terms, the Settlement Agreement obligates Defendants to deposit at least $6.6 million for distribution to Class Members. (Exh. D-47, p. 29-30 n. 2-4) The Settlement Agreement further provides for creation by Defendants at that time of an Attorneys' Fee Fund of $900,000 for payment of such attorneys' fees up to that amount as may be directed by the Court. (Exh. D-47, p. 31-32) This obligation of Defendants is over and above the $6.6 million class distribution. The Settlement Agreement affords the Court the discretion to establish the amount of attorneys' fees, not to exceed $900,000 in the aggregate, and to allocate the fees among present Class Counsel and others whose efforts are determined to have made a material contribution to the Settlement. (Exh. D-47, p. 29)

The efforts of Class Counsel, and other counsel, have resulted in provision for a common fund of $6.6 million.[9] The authority of a court to award attorneys' fees based on the common fund created in class action litigation is well established. The determination of a reasonable amount is generally made under "the 'lodestar' approach (hours expended x hourly rate) or as a 'percentage of benefit,' " or to some extent both. Holmes, Mem. Op. at 44; 4 *Newberg on Class Actions* §§ 14:5-14:7. Because the percentage of benefit methodology readily produces a reasonable result in this complex action, it shall be followed. *See, e.g., In re Catfish*, 939 F.Supp. at 499-501.

"No general rule can be articulated on what is a

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[9]Their efforts also resulted in the substantial injunctive relief which is of considerable value.

reasonable percentage of a common fund." 4 *Newberg on Class Actions* § 14:16, p. 550. The $900,000 amount here is approximately 14% of the $6.6 million common fund. Such a percentage appears to fall very much on the lower end of judicially approved percentage awards. *See In re Catfish*, 939 F.Supp. at 501 (use of 25% as "benchmark percentage"; noting awards commonly fall between 20% and 30%); 4 *Newberg on Class Actions* § 14:6, p. 550-51 (upper end of 50%; securities and antitrust litigation 20% to 33 1/3 %; "mega-fund settlements" more than 15%; multiple instances of 33 1/3 % awards).[10] Moreover, the $900,000 is not to be paid out of the common fund as is more often the case. Determining the percentage based on Defendants' total monetary obligation of approximately $7.5 million reduces the percentage constituting attorneys' fees to approximately 12%. Clearly, a total attorneys' fee award of $900,000 is reasonable in light of the efforts expended and results obtained by counsel.

As indicated above, these proceedings were initiated by the Class Representative in the *Bryant Jones* action, referenced throughout this opinion. Some of the state court plaintiffs were

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[10]The reference here to 14% of the common fund affords no consideration to the benefits of the injunctive relief. When ascertaining the benefit of a settlement to the class, a court may consider benefits which are not directly pecuniary in nature. *See Hall v. Cole*, 412 U.S. 1, 7 n.7 (1973) (benefit associated with relief "which corrects or prevents an abuse which would be prejudicial to the rights and interests of others"). The substantial benefit associated with the injunctive relief, although unquantifiable, further corroborates the reasonableness of the attorneys' fees percentage of the common fund.

materially involved in *Bryant Jones*. For reasons similar to those justifying special payments to the *Bryant Jones* class representatives as well as to certain state court plaintiffs, the Court has previously indicated that it will consider the issue of whether an allocation of a portion of the $900,000 Attorneys' Fee Fund to their counsel is appropriate. *See Forbush v. J.C. Penney Co.*, 98 F.3d 817, 819, 825 (5th Cir.1996) (allocation of total attorneys' fee award to others than lead class counsel); *Longden v. Sunderman*, 979 F.2d 1095, 1098, 1101, 1104 (5th Cir.1992) (affirming allocation of portion of class counsel's fee to counsel who initiated litigation on nonclass basis as "district court was in a unique position to observe ... case from start to finish, and it could properly include observation of the performance by all counsel, including Class Counsel").

The Court has received no submission from *Bryant Jones* class counsel or other counsel regarding their desire to make application for a portion of the Attorneys' Fee Fund, but continuing with the precedent that has been established in this Court for allowing all parties to be fully heard, a percentage of the fund will be set aside in the Final Judgment which follows in such amount as the Court deems proper at that time, with the major part of the fund being allocated to class counsel in this case. The setting aside of this fund will not affect the Final Judgment in this case, nor is it to be taken as an indication as to what the Court will do in the end. This process should be viewed as it is intended, which is an opportunity for all sides to be heard on this issue at the appropriate time. Any counsel who wishes to apply for a portion of these funds must do so within thirty days from the entry of the Final Judgment in this case.

Overall Assessment of Settlement

The foregoing consideration of the commonly applied

settlement evaluation factors, individually and collectively, weighs in favor of Settlement approval. Again, "the most important consideration [in evaluation of settlement fairness, reasonableness, and adequacy] is 'the strength of the case for plaintiffs on the merits, balanced against amounts offered in settlement.' " Petrovic, 200 F.3d at 1150 (citations omitted). (P. 27, *supra*) " 'It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.' " *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir.2000) (citation omitted).

Here, there are significant questions associated with the merits of the Class' claims. Plaintiffs' success depends to a significant extent on their ability to overcome what appear to be written disclosures and other requirements with which Defendants maintain they were in full compliance. Having reviewed all the pleadings, much of the discovery and having heard from counsel during the various sessions where Plaintiffs were afforded an opportunity to expound on their various theories, the Court has come to the conclusion that the Settlement is fair and adequate for all the reasons set forth in this opinion including the opinion of the undersigned that the merits of the Class' case are indeed questionable.

The amount of compensatory payments provided under the Settlement ($2.2 million) is only a small fraction of the potential recovery if all premiums and associated charges were found unlawful. Combining all payments to be made by Defendants ($7.5 million which is over 10% of Defendants' consolidated net worth), however, more than triples the direct monetary obligations of Defendants. The equitable relief is significant, including both a myriad of required disclosures and an abandonment of fees appearing to be statutorily authorized.

Inasmuch as the *Bryant Jones* case originally initiated these proceedings, and further, inasmuch as a tentative settlement was reached in that case and although the settlement was, in the end, avoided, this Court felt a need to consider the figures which were initially agreed upon in this earlier case in order to be reassured that the compensatory and equitable relief awarded in the case sub judice, at the very least, rise to the level of that initially agreed upon in this earlier case. At the outset of this inquiry the Court is aware that today's class is considerably larger than the Jones class and, therefore, any merit in juxtaposing the two cases is diminished. Nevertheless, according to documents provided, the final settlement agreement proposed in the *Bryant Jones* case provided for a compensatory damages fund of $1,500,000, a punitive damages fund of $3 million dollars and an Attorneys' Fees Fund of $900,000 and twenty six elements of equitable relief. In this case the Settlement Agreement provides a compensatory damage fund of $2.2 million, a punitive damage fund of $4.4 million and an Attorneys' Fees Fund of $900,000 which does not represent an increase in this case vis-a-vis the Jones case notwithstanding an increase in monetary damages. As to injunctive relief, the specified seventy items of relief are more comprehensive here than they were in this earlier litigation and the proposed settlement therein. The Court recognizes, of course, that the settlement in Jones was thwarted for reasons which remain unclear. The Court further understands that what occurred in the initial class action has no precedential value here, but the thought processes of both class counsel and defense counsel in this earlier action underscores what this Court has concluded independently of this earlier action, which is, that the Settlement in this case is reasonable, fair and adequate.

Objectors principally consist of counsel attempting to

pursue competing identical claims. *See In re Prudential Ins. Co. of America Sales Practices Litigation*, 148 F.3d 283, 318 (3d Cir.1998) (that "most vociferous objectors are ... litigants represented by counsel in cases that compete with or overlap [class] claims" a factor weighing in favor of approving settlement). The incentive for the competing actions emphasized by objectors' counsel is alleged entitlement to punitive damages. Setting aside whether such an outcome is likely, contentions of greater individual entitlement to punitive damages do not demonstrate that the Settlement is unreasonable. The legal questions concern whether in light of the alleged reprehensibility of the Defendants' conduct, the amount of punitive damages adequately serves the penal and deterrent purposes of punitive damages. The $4.4 million stipulated in the Settlement unquestionably falls within such an arguable range.

The proponents of the Settlement have generally satisfied their burden to demonstrate the Settlement is fair, adequate and reasonable. The Court declines, however, to approve the Settlement Agreement with the release of claims provision as presently submitted. The release of claims provision should be modified to expressly exclude claims against American Federated, if any, for alleged failure to pay insurance benefits. Further, while not addressing the Settlement Agreement per se, the class certification should be modified to clarify the scope of the claims covered which would also necessitate some modification of the release. (P. 81, infra)

The Continued Certification of the Mandatory Class

The Norris/Sakalarios group of state court plaintiffs (66 persons) and the Arbuthnot/Barnes group of state court

plaintiffs (656 persons) represented by class counsel in *Bryant Jones* unsuccessfully appealed from the September 9, 1998 class certification order and concomitant order staying parallel proceedings. (P. 4-8, *supra*) On September 20, 2001, this Court on remand afforded the foregoing persons and other Class Members a hearing to present evidence and arguments addressing the continued propriety of class certification. (Exh. D-38, p. 7; P. 8-12, *supra*) Participants in the September 20, 2001 hearing constitute a significant majority of the Class Members objecting to the Settlement. (Compare P.8-12 with P. 17-19, *supra*) In conjunction with and at the August 27, 2002 and December 9, 2002 fairness hearings, the Court afforded all objectors opportunity to present additional evidence and arguments concerning mandatory participation in the Class and therefore in the Settlement. (P. 17-21, *supra*)

The Objectors' Challenges to Continued Class Certification

Objectors do not contend this proceeding should not be certified as a class action under Rule 23. They do not contest the presence of the four Rule 23(a) requisites of numerosity, commonality, typicality and adequacy of representation. Objectors do raise adequacy of representation issues in the context of an allegedly inadequate settlement. Some objectors also posed questions concerning the alleged necessity of subclasses to address bad faith and wrongful foreclosure claims. For the reasons explained above (P. 61, 62, *supra*), these purported claims falling outside the present controversy do not raise adequacy of representation concerns.[11]

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[11]The Class Representatives borrowed money from Tower, pledged collateral to secure the loans, and obligated

Objectors assert the Court erred in not certifying the Class under Rule 23(b)(3). Objectors argue they must be afforded the right to opt out of the Class to maintain their own litigation. In contending the Court erred in certifying the Class under Rule 23(b)(1)(A) and Rule 23(b)(2), objectors never directly address the Court's findings in the September 9, 1998 opinion explaining the reasons for such certification. (Exh. D-20) Objectors erroneously accuse the parties of orchestrating equitable relief in the Settlement Agreement to permit mandatory class certification. Yet, despite having been afforded multiple opportunities to substantiate their positions, objectors unpersuasively address mandatory class certification issues in only a conclusory fashion without adequate support of their claims as pleaded and presented on the record. The same is true for objectors' regarding due process principles in arguing for opt-out rights.

Continued Class Certification Under Rule 23(b)(1)(A)

The Court laid out the bases for Rule 23(b)(1)(A) certification in its 1998 certification opinion. (Exh. D-20, p. 13-18; P. 4,5, *supra*) Among other things, the Court characterized the present action as among those commonly

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themselves to purchase property insurance and credit life or disability insurance which they contend was forced upon them through deceptive practices. (Exh. P-1, p. 6- 7, exh. A; exh. P-2, P-3) The Class Representatives' status and the claims they are pursuing are no different than those of the Class Members, including objectors. Hence, Class Counsel appropriately requested that Claudia Smith (Love) and Wilbert Walker be substituted as the Class Representatives; the Court entered the order of substitution on November 19, 2001.

identified as "practical candidates" for Rule 23(b)(1)(A) certification. (Exh. D-20, p. 13-14) The Court noted other judicial decisions affording Rule 23(b)(1)(A) treatment in controversies addressing standardized, preprinted contracts or uniform business practices. (Exh. D-20, p. 14) The Court also emphasized the presence of multiple lawsuits challenging Tower's business practices which defendants maintain were uniformly implemented because of law and practical circumstances. (Exh. D-20, p. 15-16) Objectors say nothing about these determinative Rule 23(b)(1)(A) factors.

Although the objectors engage in a boilerplate discussion of Rule 23(b)(1)(A) they do not adequately confront the circumstances before the Court. As an example, they contend that Rule 23(b)(1)(A) is inapplicable "because one jury's decision to award damages and another jury's decision not to award damages (or to award damages in a different amount) do not 'establish incompatible standards of conduct for the party opposing the class.' " (Docket No. 148, p. 14-15).[12] Although this contention correctly states an abstract legal proposition it does not have probative value regarding the facts before this Court.

Objectors ignore the pendency of multiple competing

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[12]This quotation appears in the submission of objectors Crystian and Shaffer. Other objectors advance this same erroneous proposition. Because counsel for Crystian and Shaffer took the lead at the August 27, 2002 fairness hearing in challenging the mandatory certification and other objectors adopted her arguments (8/27/02 Tr. p. 230, 243-44, 279, 305), the Court specifically references particular contentions of Crystian and Shaffer as those of objectors generally.

actions which do indeed create the risk of different courts establishing incompatible standards of conduct for Tower and American Federated. Objectors incorrectly state "the Court's reasoning does not support mandatory certification of damages claims because such reasoning would apply to any situation in which more than one plaintiff sued a defendant for damages arising from the same event ...." (Docket No. 148, p. 15-16) The Court recognized this controversy substantially involves how Tower has and will in the future do business. The Court emphasized "virtually every parallel action seeks injunctive relief," including separate demands of five different state courts for "a court-ordered plan establishing future procedures for insurance placement." (Exh. D-20, p. 15-16)

Plaintiffs' claims, including objectors' claims, cannot be construed at this late date as limited to separate proceedings for damages tied to the "same event." The claims here are not damages actions for a disastrous event affecting many people. The primary issue is not one of whether one jury finds damages to be owed for past conduct and another does not. At stake is how Tower could act prospectively if confronted with conflicting findings, including conflicting court-ordered plans establishing the future policies and practices to be followed. Such overriding questions are what led this Court to conclude "this controversy squarely falls under Rule 23(b)(1)(A)." (Exh. D-20, p. 15)

Objectors erroneously suggest *Allison* precludes Rule 23(b)(1)(A) certification here. They quote from an *Allison* footnote: "'Given the individual-specific nature of the plaintiffs' claims for compensatory and punitive damages, we perceive no risk of inconsistent adjudications or incompatible standards of conduct in having those claims adjudicated separately.' *Allison*, 151 F.3d at 421 n.16." (Docket No. 148, p.

17) *Allison* denied certification in an employment discrimination action involving individualized claims for disparate treatment. Both whether damages (compensatory and punitive) would be awarded and the amounts of any such damages were driven by individual employees' circumstances. *See Allison*, 151 F.3d at 416-18, 420.[13] *Allison*'s facts are foreign to those here involving readily calculable monetary relief based on insurance premiums paid and punitive damages based on the alleged egregiousness of the uniform policies consistently applied to all Class Members. The Court has more thoroughly addressed *Allison* in the 1998 certification opinion. (*See* Rule 23(b)(2) discussion of *Allison* in 1998 certification opinion, exh. D-20 at 20-21)

Nor do the other cases cited by objectors undermine the Rule 23(b)(1)(A) certification. The three decisions[14] referenced by Objectors stand for the proposition that multiple actions for damages raising only the prospect of different damages verdicts do not create the requisite risk of establishing incompatible standards of conduct for the party opposing the class. The *Bendectin* case involved numerous claims for monetary damages arising from birth defects allegedly caused

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[13]Indeed, because of the predominance of individual-specific issues, Rule 23(b)(3) certification, an undisputed given here, was also unavailable in *Allison*. *See* 151 F.3d at 419-20.

[14]The three cases cited by objectors are *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir.1987); *In re Bendectin Liability Litigation*, 749 F.2d 300 (6th Cir.1984); and *McDonnell-Douglas Corp. v. U.S. District Court for Central District of California*, 523 F.2d 1083 (9th Cir.1975).

by the prescription drug Bendectin. In this context of product liability claims, the court merely concluded "the fact that some plaintiffs may be successful in their suits against a defendant while others may not is clearly not a ground for invoking Rule 23(b)(1)(A)." *In re Bendectin*, 749 F.2d at 305. *McDonnell-Douglas* is even more limited. That action addressed wrongful death claims for an airplane crash. Again, the holding enforced the proposition (not before this Court) that "independent tort claims arising out of the same occurrence and [which] assert only liability for damages" are not to be certified under Rule 23(b)(1)(A). *See McDonnell-Douglas*, 523 F.2d at 1085-86. *Dennis Greenman Securities* addressed a securities fraud perpetrated over a four-year period. The court understandably found competing damages actions arising out of fraud did not create inconsistent standards for future conduct merely "because a defendant may be found liable to some plaintiffs and not to others." Dennis Greenman Securities, 829 F.2d at 1545.

Continued Class Certification Under Rule 23(b)(2)

Objectors contest the Rule 23(b)(2) certification essentially through two related approaches. First, utilizing the amended complaint, the Settlement Agreement and characterizations of individualized damages claims, objectors erroneously argue equitable relief does not predominate under *Allison*. Second, relying on two post-*Allison* Fifth Circuit decisions issued after the Court's 1998 certification opinion, [15]

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[15]These two post-*Allison* decisions are *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir.2000), and *James v. City of Dallas*, 254 F.3d 551 (5th Cir.2001).

objectors contend the Court erroneously failed to certify the Class on a claim-by-claim basis and the injunctive relief provisions are irrelevant to Class Members not presently in a contractual relationship with Defendants. There is some merit to contentions of no claim-by-claim certification which will be discussed below. Otherwise, the record and case law, including the Fifth Circuit's post-certification decisions in *Bolin* and *James*, continue to warrant certification under Rule 23(b)(2). [16]

The Predominance of Injunctive Relief

Objectors challenge findings of the predominance of injunctive relief under *Allison* in basically three ways. (i) They contend the parties' emphasis on equitable relief in the Settlement Agreement is "pure sophistry" in light of the demands for damages in the amended complaint. (ii) Objectors assert the broad release in the Settlement Agreement of all kinds of damages claims portrays the predominance of damages over equitable relief. (iii) They maintain their claims are "highly individualized" which bars certification under *Allison*.

Objectors erroneously suggest the parties, and the Court, are improperly looking to the Settlement Agreement

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[16]As with the Rule 23(b)(1)(A) discussion, various objectors' positions on Rule 23(b)(2) applicability are included within the more comprehensive challenges of Crystian and Shaffer. The focus here will be on the Crystian and Shaffer written and oral submissions recognizing that the other objectors' positions are likewise being addressed. (Compare Docket No. 144, ¶ 5; Docket No. 145, ¶¶ 1 & 3; & Docket No. 152, ¶ 1 with Crystian & Shaffer submission identified as Docket No. 148 & 8/27/02 Tr. p. 232-42)

rather than to the amended complaint to substantiate findings of the predominance of equitable relief. The Settlement Agreement is predicated on the amended complaint.[17] That multiple counts of the complaint may demand damages for alleged wrongful conduct is not determinative. The same alleged wrongful conduct, which is continuing, is also the basis for the injunctive relief. Objectors' separation of the complaint into 18 counts for damages as contrasted with a single count for injunctive relief is without merit. The separate count for injunctive relief simply highlights the particular equitable relief justified by the continuing wrongful conduct alleged throughout the complaint.

Objectors' contentions of equitable relief being nothing more than "an afterthought to the principal claims for damages" (Docket No. 148, p. 6) conflict not only with the present class action complaint but with the *Bryant Jones* class action complaint and numerous other complaints of objectors. The

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[17]The Settlement Agreement is to be evaluated in the context of the reasonableness of the proposed Settlement in light of the Class' claims. The Settlement Agreement does not serve as the basis for class certification. That is the function of the amended complaint as pursued by the named plaintiffs seeking to serve as class representatives. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). For this same reason the limitation of the injunctive relief in the Settlement Agreement to a five-year period is not problematic. That the injunctive relief is not permanent goes to the reasonableness of the Settlement but not to the genuineness of the equitable relief demands. The time period covered by the injunctive relief, just like the specific practices enjoined, was the subject of compromise.

subject complaint, the *Bryant Jones* complaint and seven state court complaints on behalf of 714 persons each contains the following summary description of the action in the introductory portion of the pleading:

> This is a combination contract, tort, and statutory action under the laws of the State of Mississippi, and under the common law of the State of Mississippi, sounding as a breach of contract, and tort for tortious breach of implied covenants of good faith and fair dealing, breach of fiduciary duties, civil conspiracy, negligence, fraudulent misrepresentation and/or omission, negligent misrepresentation and/or omission, tortious interference with a contract, unjust enrichment, restitution, declaratory relief, injunctive relief, equitable relief, and punitive damages.

(Exh. D-3(a), (i), (j), (l)-(o)).[18] Thus, the equitable demands of unjust enrichment and for restitution tie the contemplated compensatory damages to the amount of insurance premiums paid; the words "compensatory damages" do not even appear in the summary description of the claims; punitive damages are being sought for the same conduct alleged to result in "unjust enrichment" and to warrant "restitution, declaratory relief, injunctive relief, [and] equitable relief." (P. 1,2 *supra*)

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[18]The quotation in the text is taken verbatim from a representative state court complaint. The subject class action complaint and the *Bryant Jones* class action complaint contain virtually identical language but also include allegations of federal claims.

Objectors' emphasis on the breadth of the release of claims language in the Settlement Agreement is misplaced. Defendants are obligating themselves to pay $7.5 million and to substantially limiting future operations to defined practices for a five-year period. The release language is therefore understandably broad. The fundamental issue is release from liability from loan/insurance placement practices. The release is not limited to damages actions; it simply includes them. The release language is properly grounded in the allegations of the amended complaint.[19] Defendants reasonably insisted on inclusion of the word "damages" regardless of whether the Class' demand for monetary relief is termed an equitable or nonequitable remedy or whether Defendants' monetary exposure for collection of insurance premiums is best described as restitution, disgorgement, unjust enrichment or compensatory damages. (*See* 1998 certification opinion, exh. 20 p. 19-20, addressing monetary liability as extension of equitable remedy and incidental nonequitable relief.)[20]

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[19]The Court previously recognized, however, the release was perhaps overly broad as to claims for failure to pay insurance benefits and declined to approve the Settlement Agreement without clarification of the release to except such claims.

[20]Objectors somewhat frivolously suggest the parties' establishment of the "Compensatory Damages Fund" under the Settlement Agreement "amounts to a concession" that Rule 23(b)(2) cannot be satisfied. From their initial class certification motions and related submissions forward, the parties have consistently maintained the monetary relief, whether termed equitable or nonequitable, was readily capable of computation without the necessity of individualized hearings. (Exh. D-20, p. 18-21) As such, any so-called

Objectors attempt to invoke *Allison* to bar Rule 23(b)(2) certification by contending "the Class Members' damages claims are highly 'individualized,' and cannot be addressed through a 'group remedy.' " (Docket No. 148, p. 9; 8/27/02 Tr. p. 234) Their allegations purporting to substantiate individualized compensatory damages claims, however, do not support their contention. Objectors Crystian and Shaffer assert:

> [A]t trial, each plaintiff would be required, among other things, to prove that he or she entered into a loan with one or more of the defendants, and that their particular loan documents violated TILA, the FDCPA, and a wide range of common-law duties. Resolving the class members' common-law claims would require knowing whether the class member was or was not told that insurance was optional (or whether the class member even knew that "packing" had occurred), whether the class member relied on the misrepresentations of the defendants, whether the terms of the particular loan were usurious, and so forth. Moreover, as to both the federal and common-law claims, the court would be required to consider the extent of the individual damages suffered (including questions relating to the length of each class member's loan, the type or quality of the

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"damages" are "incidental" under *Allison*. Moreover, *Allison* recognizes that claims for punitive damages, like those here, may also be "incidental." *See Allison*, 151 F.3d at 417-18. (See also exh. D-20, p. 21)

> personal property insured, mitigation, mental suffering and other consequential damages, and the like), and a host of other matters specific to that class member's claims.

(Docket No. 148, p. 9-10)

All of the above alleged "individual" issues are properly before the Court on a classwide basis. Every Class Member is a Tower borrower. While perhaps not identical in every respect, the loan documents are substantially the same concerning the material issues. The Class Representatives contend Tower wrongfully coerced them to purchase credit insurance. (Exh. D-1, ¶¶ 8-10, 16, 19, 55, 103) To assert that a Class Member was not told insurance was optional (particularly in light of the indisputable written disclosures) does not create an individual issue regarding reliance on an alleged fraudulent omission. (P. 38-39, *supra*.) There are no individualized claims for "mental suffering and other consequential damages, and the like." The Class Representatives do not allege any; no objectors substantively suggested any; and no basis exists for judicial speculation regarding any such individualized claims.[21] As previously

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[21]Crystian is a five-time Tower borrower who borrowed as recently as 2001. Shaffer is a six-time borrower with an existing relationship with Tower today. It is not credible to suggest borrowers, particularly repeat borrowers such as Crystian and Shaffer who continued to borrow after commencement of their state court actions, endured "pain and suffering" for allegedly having to purchase insurance they did not want. Neither the affidavits of Crystian or Shaffer nor of any other objector intimate any such pain and suffering.

found by the Court, the Class Members' claims "are not individualized claims under *Allison*," for the damages amounts are "readily capable of computation by following the objective standards of calculating the amounts of insurance premiums charged plus the associated finance costs." (Exh. D-20, p. 20) Such damages are in the nature of a "group remedy" as they "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *See Allison*, 151 F.3d at 415.

Application of *Bolin* and *James*

Objectors urge *Bolin* requires decertification under Rule 23(b)(2) for essentially four reasons: (i) Class Members' claims based on individual circumstances cannot be certified under the claim-by-claim approach required by *Bolin*. (ii) Claims of Class Members no longer in a contractual relationship with Defendants cannot be certified because these Class Members do not face further harm from Defendants' actions. (iii) Through "shoehorning" this alleged damages action under Rule 23(b)(2) Defendants are improperly attempting to purchase res judicata.

Special counsel for Crystian and Shaffer also mischaracterized the instances of when her purported clients borrowed from Tower. (Compare Docket No. 148, p. 3, with 12/9/02 Tr. p. 10-11, exh. D-57 & exh. D-58.) Further, the unfounded allegations of Crystian and Shaffer regarding unliquidated damages conflict with the representations of counsel for the group of 693 objectors who depicted the value of the compensatory claims to be from several hundred to perhaps several thousand dollars, an obvious reference to the amount of insurance premiums and associated charges in issue. (P. 20, *supra*)

(iv) Statutory claims for which injunctive relief is not an available remedy are included in the certification. Except for several federal statutory claims for which injunctive relief is unavailable, objectors' contentions are meritless.

Objectors' continued assertion of alleged individual claims repeats the arguments previously addressed in the context of *Allison*. *Bolin* follows *Allison*, including quoting extensively from *Allison*, in identifying what constitute "incidental damages" for purposes of whether injunctive relief predominates. *See Bolin*, 231 F.3d at 976 (quoting *Allison*, "'incidental damages' " are those " 'capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances' "). Objectors' conclusory assertions that the damages claims "depend entirely on the Class Members' individual circumstances" are unconvincing. Further, the Class Members are pursuing TILA claims for statutory damages which are otherwise statutorily capped as to the Class at $500,000. *See* 15 U.S.C. § 1640(a)(2)(B). *Bolin* recognized that the supra-compensatory damages authorized by the ... TILA require no individualized calculation, but are awarded to the class as a whole. *Bolin*, 231 F.3d at 977. *Bolin* rejected Rule 23(b)(2) certification under TILA because injunctive relief was not being genuinely sought, not because damages could not be readily computed. Objectors again fail to offer any credible validation of purported common law claims dependent on individualized circumstances.[22]

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[22]Objectors' contentions concerning the alleged necessity of individualized hearings on the FDCPA claims as referenced in *Bolin* are moot. Because the Court has determined below that injunctive relief is not available under

Objectors disregard the allegations of the amended complaint, the allegations of their own state court complaints and their presentations at the hearings in contending Class Members not presently in a contractual relationship with Defendants do not benefit from injunctive relief. The Class Representatives maintain they are fundamentally attacking the alleged practice of "insurance packing." (Exh. D-1, ¶¶ 8, 23) Insurance packing is allegedly the result of "the use of deceptive or coercive marketing practices." (Exh. D-1, ¶ 8) Among other things, the amended complaint alleges Tower falsely advertises and solicits borrowers which leads to indebtedness for which the true costs of the loan are not disclosed. (Exh. D-1, ¶¶ 14, 103(a), 106(c)) The Class complains of loan "flipping" practices. The requested injunctive relief seeks the termination of the alleged predatory practices and the restructuring of future practices to assure borrowers are not victimized by insurance packing. The *Bryant Jones* class action complaint was filed in 1996 and the present class action complaint was filed in 1998. That a Class Member may not be presently indebted to Tower does not render injunctive relief addressing the challenged practices, including loan solicitation, meaningless.

Objectors' state court complaints likewise reflect an institutional assault, including the attack of alleged "insurance packing" allegedly perpetrated through "the use of deceptive or coercive marketing practices." (E.g., exh. D-3(o), ¶¶ 13, 27; 8/27/02 Tr. p. 286) Objectors, too, complain of false advertising and solicitations. (E.g., exh. D-3(o), ¶¶ 18, 83(a), 87(c)) They also assert "flipping." (E.g., exh. D-3(o), ¶ 29; 8/27/02 Tr. p.

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the FDCPA, no FDCPA claim is being finally certified under Rule 23(b)(2).

286) Objectors demand injunctive relief to terminate existing predatory practices and to restructure future practices, specifically asserting the rights of "future borrowers." (Exh. D-3(a) thru D-3(k), count XII)

At the September 20, 2001 hearing addressing Class Member challenges of the class certification, objectors largely complained of Tower's continued solicitation of borrowers through alleged predatory practices. (Exh. D-38, p. 21-24, 55-56, 62) They criticized the absence of injunctive relief remedying such practices. (Exh. D-38, p. 23-24) Objectors' counsel emphasized the importance of judicial intervention due to the borrowers' alleged inabilities to protect themselves and the absence of other sources of credit. (Exh. D-38, p. 38, 43, 51-52) Objectors' counsel described their clients as having been victimized by the same practices as the Class Representatives. (Exh. D-38, p. 61) At the August 27, 2002 fairness hearing, objectors similarly complained that all had been victimized by "Defendants' clearly institutionalized and very clearly improper ... predatory lending practices ... the packing and the flipping and those sorts of things." (8/27/02 Tr. p. 286) The demands for judicial intervention to halt existing practices and to restructure future practices are not limited to persons presently indebted to Tower.

Every plaintiff, here and in the state court complaints, assails the alleged practice of loan "flipping." They define "flipping" as "the practice of encouraging the borrower to refinance, or renew, the balance due on the loan with a new loan at frequent intervals in order to allow the lender to pack additional insurance premiums on the new loan and in order to allow the lender to receive additional interest, or costs, on the same amount of funds loaned." (Exh. D-3(o), ¶ 29) The emphasis is on Tower encouragement of borrowers to borrow

again to enable Tower to allegedly extract more charges and fees. Objectors' across-the-board attack of the practice evidences they contend they have been, or fear that they will be, victimized by the practices. Objectors' allegations of flipping on behalf of some 800 persons themselves depict the class-based nature of the complaint. Their own requests for injunctive relief are to be understood in this light.

That today, some Class Members may not presently have an outstanding loan balance does not undo the significance of injunctive relief, generally or as to them. The scope of the borrowers' multiple challenges of ongoing practices, the certainty that all Class Members will be solicited, and the substantial probability that the vast majority of Class Members are or will be repeat borrowers (P.1-4, *supra*; P. 49, *supra*) adequately demonstrate the genuineness of class-based injunctive relief under *Bolin*.[23]

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[23]Such circumstances are a far cry from those in *Bolin* where the class was composed of *bankrupt* debtors who, "since 1988," had either "paid money to Sears post-petition, had property repossessed or garnished, or [had] expended legal fees connected with Sears's collection efforts." *Bolin*, 231 F.3d at 978. Obviously, "most" of that class consisted of persons not facing further harm from the defendants' actions. *Id.* Objectors' reliance on *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545, 553-54 (5th Cir.2003), is similarly misplaced. In that breach of warranty action, "Fleetwood sold its motor homes over a limited period of time to limited number of purchasers." *Id.* at 554. There was no challenge of ongoing defendant practices or any prospect of future defendant conduct affecting any class member.

Objectors have employed a host of descriptives to attack the injunctive relief sought under the amended complaint and provided in the Settlement Agreement. The attacks range from "meaningless," "an afterthought," "a facade," "transparent," to "pure sophistry." Citing *Bolin*, the stated concern is the alleged wrongful deprivation of opt-out rights which enables Class Counsel to acquire thousands of clients and affords the defendants protection under res judicata. (Docket No. 148, p. 14) Moreover, objectors emphasize that the nature of the injunctive relief warrants a very careful evaluation by the Court, especially in light of the agreement, in principle, by Class Representatives and Defendants as to the significance of injunctive relief both at the class certification stage and in the settlement. The Court agrees with the objectors in this regard and has given this and all aspects of the certification and settlement careful scrutiny for all the reasons set out at the very beginning of this memorandum.

The predominance of injunctive relief originally found by this Court (Exh. D-20, p. 18-21) continues to withstand scrutiny. The above findings and conclusions associated with the global challenges of institutional practices, the multiple demands for injunctive relief by not only the Class Representatives but also specifically by a number of objectors, and the absence of genuine individualized claims all substantiate the genuineness of injunctive relief.

Defendants cannot be faulted for seeking a comprehensive resolution of this controversy. The Defendants' counterclaim for declaratory relief addressing the lawfulness of their practices is understood. Circumstances prevailing then (as well as now) clearly warranted a unitary adjudication declaring Defendants' rights, duties and obligations in implementing uniform business practices dictated by law and practical

circumstances. Defendants filed a motion apart from the named plaintiff, seeking certification under Rule 23(b)(1)(A) and Rule 23(b)(2). The Court's certification opinion granted Defendants' request for mandatory class certification. Rule 23(b)(2) provides for class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief *or corresponding declaratory relief* with respect to the class as a whole." *See Allison*, 151 F.3d at 411 ("The rule is clear that claims seeking injunctive or declaratory relief are appropriate for (b)(2) class certification."). Unquestionably, Defendants' demand for declaratory relief seeks redress for injuries allegedly uniformly sustained across the Class. *See Bolin*, 231 F.3d at 975 (uniformity of injury across class renders notice and opt-out provisions of (b)(3) unnecessary). The injunctive relief in the Settlement Agreement, while it may grant more relief to the Class than legally required, constitutes the warranted declaration of Defendants' rights, duties and obligations sought in the counterclaim.

Moreover, it bears repeating that this controversy was initiated not by present Class Counsel but by *Bryant Jones* class counsel. *Bryant Jones* class counsel now represents the majority of objectors advancing virtually identical challenges in state court litigation. *Bryant Jones* class counsel, the former proponent of the necessity of injunctive relief, is working with special counsel on two fronts to accomplish a result which is contradictory to the relief sought by the *Bryant Jones* complaint, by their own state court complaints, and by the state court complaints of other counsel with whom they are

collaborating.[24] The objectors now gainsay that which they once embraced. Nevertheless, this reversal in strategy does not cause this Court to come to the conclusion it has reached regarding the predominance of injunctive relief. Moreover, it is the opinion of the Court that the issue of mandatory class certification is wholly and independently supported by the record in this case.

Further regarding the necessity of claim-by-claim certification, *Bolin* found that "to determine whether damages predominate, a court should certify a class on a claim-by-claim basis, treating each claim individually and certifying the class with respect to only those claims for which certification is appropriate." 231 F.3d at 976. The court specifically noted that "the unavailability of injunctive relief under a statute would automatically make (b)(2) certification an abuse of discretion." 231 F.3d at 977, n.39. Class certification is reexamined below in light of these teachings.

Injunctive relief would unquestionably be available (if liability were to be found) with respect to the Class' common law claims. *Bolin*'s focus is understandably on the availability

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[24]Special counsel were engaged to represent objectors Crystian and Shaffer, persons represented by *Bryant Jones* counsel in the Barnes state court action. Special counsel were engaged to represent the group of 693 objectors, persons represented by *Bryant Jones* counsel in the Barnes, Arbuthnot and other state court actions. (P.18, *supra*) Mr. Sakalarios, who also represents a group of objectors with Mr. Norris, has also appeared on behalf of the group of 693 objectors. (Docket Nos. 152 & 153)

of injunctive relief under statutory causes of action. Injunctive relief is available for valid claims under the Sherman Act. *See, e.g., Kruman v. Christie's International PLC*, 284 F.3d 384, 397 (2d Cir.2002); *Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc.*, 246 F.3d 752, 755-56 (5th Cir.2001). Injunctive relief is also available for the Class' claims under the Truth-in-Lending Act. *See Guarte v. Furniture Fair, Inc.*, 75 F.R.D. 525, 529 (D.Md.1977).

As strongly suggested but not specifically held by the court in *Bolin*, injunctive relief is not available under the Fair Debt Collection Practices Act. *See Bolin*, 231 F.3d at 977 n. 39 and authorities cited therein (noting that, while the Fifth Circuit "has not definitively ruled on the issue, courts uniformly hold that the FDCPA does not authorize equitable relief"). Injunctive relief would also not be available to the Class under their federal mail fraud and due process claims for which they have no private right of action against Defendants. (*See* P. 356, *supra*.)[25]

Objectors assert that *James*,[26] as contrasted with the circumstances here, typifies an instance where monetary damages are "truly incidental." (8/27/02 Tr. p. 240-41) The court in *James*, of course, did not remotely suggest that the particular circumstances before them constituted the only factual scenario for Rule 23(b)(2) certification. Rather, the court specifically observed they were "guided in [their]

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[25]Injunctive relief is available under the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, but the Court is of the opinion the Class is not actively pursuing any such claims. (P. 34, *supra*)

[26]*See* Citation on page 31, *supra*

'predominance' analysis by the careful discussion of Rule 23(b)(2) set forth in *Allison*." *James*, 254 F.3d at 571. No new legal standards were established. In upholding the Rule 23(b)(2) certification, the court simply "conclude[d] that none of the concerns articulated in *Allison* bar[red] class certification." 254 F.3d at 572. Citing *Allison*, the court found the "requested relief [was] consistent with the group-oriented nature of the alleged injury and present[ed] no conflict with the injunctive purposes of Rule 23(b)(2)." *Id.* As repeatedly explained, the same is true here.

The Fifth Circuit's post-*Allison* decisions rendered after the 1998 certification of the class in *Bolin* and *James* affirm the *Allison* principles on which this Court relied in certifying the Class under Rule 23(b)(2). The claim-by-claim certification requirements articulated in the decisions require this Court to modify the scope of the Rule 23(b)(2) certification as set forth above but not to abandon it.

Due Process Rights

Objectors argue the mandatory class certification denies Class Members due process. They cite several United States Supreme Court decisions[27] and a Ninth Circuit decision [28] in

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[27]The Supreme Court decisions are *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) (Ginsberg, J., concurring in part and dissenting in part); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985).

[28]The Ninth Circuit decision is *Brown v. Ticor Title Ins. Co.,* 982 F.2d 386 (9th Cir.1992), *writ dismissed as*

support of their alleged constitutional right to opt out of the Class. These contentions, however, are unpersuasive. They rest on alleged rights of persons possessed of unliquidated, individualized, substantial damages claims. As already addressed (P, 20, P. 79-80, *supra*), there are no such claims here.

Objectors cite Shutts for the proposition that "in class actions seeking to bind plaintiffs with respect to 'claims wholly or predominantly for money damages,' " due process requires Class Members be afforded the opportunity to opt out. (Docket No. 148, p. 17) Objectors assert "Rule 23 codified the constitutional right to opt out for class members with damages claims" through Rule 23(b)(3). (Docket No. 148, p. 19) Shutts itself addressed a state law version of federal rule 23(b)(3). Thus, objectors' insistence on a due process right to opt out is largely one of rearguing the correctness of the class certifications under Rule 23(b)(1)(A) and Rule 23(b)(2), arguments already rejected.

Objectors emphasize Supreme Court observations in *Ortiz* concerning damages claims in a mandatory class. *Ortiz* involved a class erroneously certified under the "limited fund" concept of Rule 23(b)(1)(B). *Ortiz*, a personal injury action, addressed a class consisting of asbestos victims possessed of substantial damages claims. The value of such personal injury claims varied significantly among individuals depending on the nature of exposure to asbestos and the extent to which actual physical injury was present. The class even included unknown future claimants. The Court's due process concerns in that

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improvidently granted, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994).

damages context are simply inapposite here.

Allison itself confirms that no due process right to opt out arises in a properly certified Rule 23(b)(1) or Rule 23(b)(2) class action. *See Allison*, 151 F.3d at 412, 413 n.7, and authorities cited. Class Members here have no constitutionally-protected property right to personally vindicate their claims for monetary relief in separate litigation. Constitutional guarantees for absent members of a mandatory class are preserved through fulfillment of the adequacy of representation requirement of Rule 23(a) and the homogeneity requirements of Rule 23(b)(1)(A) and Rule 23(b)(2) associated with the necessary unitary adjudication of all claims. *See Allison,* 151 F.3d at 412-15.[29]

Conclusion

The Court basically has three alternatives in addressing Settlement approval: (i) The Court may approve the Settlement Agreement as submitted. (ii) The Court may reject the Settlement Agreement in its entirety. (iii) The Court may reject the Settlement Agreement as submitted with suggestions which if accepted would lead to Settlement approval. Here, as set forth in the above findings and conclusions, substantial grounds

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[29]Moreover, beyond the class certification on the merits, Class Members here have been afforded additional "due process" through the Notice of Settlement and opportunities afforded to object to the Settlement. *See Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981) (due process satisfied in Rule 23(b)(2) settlement when notice but no opportunity to opt out provided) (cited in *Allison* at 151 F.3d at 413-14, n.7).

exist for approval of the Settlement Agreement provided certain modifications are accepted by the Defendants.

The Settlement Agreement contemplated continued certification of a mandatory class under Rule 23(b)(1)(A) and Rule 23(b)(2) of all claims alleged in the amended complaint. In light of decisions of the United States Court of Appeals for the Fifth Circuit rendered after the Court's original 1998 class certification, this certification is overly broad. For the Settlement to obtain this Court's approval, the class must be recertified on a claim-by-claim basis consistent with the conclusions of law set forth above. (P. 87-88 *supra*) Such a certification will result in federal claims under the Fair Debt Collection Practices Act, the Civil Rights Act of 1991 and the federal mail fraud statute no longer being certified. The certification of the remaining claims would continue to be under Rule 23(b)(1)(A) and Rule 23(b)(2). No Class Member would be permitted to opt out of the Settlement.

The Court has also determined that the scope of the proposed release of claims is overly broad. For the Court to approve the Settlement, claims, if any, associated with the Fair Debt Collection Practices Act, or the Civil Rights Act of 1991, or the federal mail fraud statute, must be expressly excluded from the release. The same is true of claims, if any, arising from the payment or nonpayment of benefits under policies of insurance issued by American Federated.

Otherwise, the Settlement Agreement is fair, adequate and reasonable. With the Court's modifications if accepted, the Settlement Agreement will be approved. If Defendants agree to the Court's suggested modifications to the Settlement Agreement, judgment will be entered consistent with these Findings of Fact and Conclusions of Law. From the filing of

this memorandum, the Defendants have three calendar days within which to notify the Court of their position regarding suggested modifications. If accepted, the Court will enter final judgment immediately thereafter.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60339

FILED
Jul 14 2004

CLAUDIA SMITH; ET AL
Plaintiffs
CLAUDIA SMITH; WILBERT WALKER
Plaintiffs - Appellees

v.

REBECCA CRYSTIAN; MARTHA SHAFFER;
Plaintiffs - Appellants

v.

TOWER LOAN OF MISSISSIPPI INC; AMERICAN FEDERATED INSURANCE CO; AMERICAN FEDERATED LIFE INSURANCE CO; FIRST TOWER LOAN INC
Defendants - Appellees

v.

CLIFTON GRAY; LARRY PICKENS; 693 MOVANT OBJECTORS

Appellants

Appeals from the United States District Court for the Southern District of Mississippi, Biloxi

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ON PETITION FOR REHEARING EN BANC

(Opinion 03/16/04, 5 Cir., _____, _____ F.3d_____)

BEFORE JOLLY, DUHE, and STEWART, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/E Grady Jolly
United States Circuit Judge

REHG-6a

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the

court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

• the nature of the action,

• the definition of the class certified,

• the class claims, issues, or defenses,

• that a class member may enter an appearance through counsel if the member so desires,

• that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or

(B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

(2)

Supreme Court, U.S.
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No. 04-488

In the Supreme Court of the United States

REBECCA CRYSTIAN, et al
Petitioners,

v.

TOWER LOAN OF MISSISSIPPI INC., et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question before the Court is not whether this class was properly certified under Fed.R.Civ.P. 23(b)(2), but whether the class was properly certified under Fed.R.Civ.P. 23(b)(1)(A).

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I. INTRODUCTION

Petitioners ask the Court to accept certiorari on the certification and settlement of a class action upon which the Fifth Circuit did not publish an opinion when originally issued and denied a motion requesting publication. The Fifth Circuit ruled that the district court did not abuse its discretion when it certified the Tower Loan class under Fed.R.Civ.P. 23(b)(1)(A). Because the district court did not abuse its discretion in certifying the class under Fed.R.Civ.P. 23(b)(1)(A), the Fifth Circuit did not address the propriety of the district court's alternative certification under Fed.R.Civ.P. 23(b)(2). The Fifth Circuit further found that the district judge did not abuse his discretion when he approved the terms of the settlement. Petitioners herein (objectors below) asked for *en banc* consideration. Not one member of the Fifth Circuit voted for en banc consideration.

This case is a "negative value" case which presents a paradigm for Rule 23(b)(2) class certification. Tower Loan customers were the victims of "predatory lending" practices, for which they sought redress. The complaint alleged that Tower Loan was guilty of "packing" borrowers loans with insurance products and that Tower was further guilty of "flipping" loans so as to cause the borrower to pay excessive interest and insurance premiums. The monetary damages typically resulting from "predatory lending" cases in Mississippi are small.

In ruling on class certification, the lower court, as well as the Fifth Circuit, applied the standard set out in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). In *Allison* the Fifth Circuit held that Rule 23(b)(2)

class certification was justified when plaintiffs' claims for injunctive relief predominated over ancillary claims for monetary reimbursement. The lower court correctly held that in this case,

> Cole seeks the restitution and disgorgement by defendants of the insurance premiums and related charges allegedly unlawfully collected. As such, the demand is not in the nature of damages, but is instead an extension of the equitable remedy. . . . Rule 23(b)(2) is readily applicable.

Memorandum Opinion p. 7-8.

In *Allison* the Fifth Circuit recognized that the existence of a negative value suit is the "most compelling rationale" for certifying a class action. *Allison*, 151 F.3d at 420. As this Court explained, a negative value suit is one in which class members' claims "would be uneconomical to litigate individually. For example, in *Shutts*, the claims averaged about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 809 (1985).

In sum, contrary to the assertions contained within the petition, the class was properly certified under Fed.R.Civ.P. 23(b)(1)(A), and alternatively certified under Fed.R.Civ.P. 23(b)(2). Because the case was alternative certified under both subsections of Rule 23, any conflict among the courts of appeals about the correct standard for Rule 23(b)(2) class certification would be moot. Accordingly, the petition should be denied.

II.. STATEMENT OF THE CASE

The Fifth Circuit held that the district court did not abuse its discretion when it certified a mandatory class under Fed.R.Civ.P. 23(b)(1)(A). The district court, however, alternatively certified this case under Fed.R.Civ.P. 23(b)(2).

Prior to class certification, numerous claims had already been filed which requested injunctive relief seeking to modify Tower's business practices. A very real possibility of inconsistent adjudications existed had these individual cases been allowed to proceed.

Injunctive Relief Predominates the Settlement.

The second amended complaint filed against Tower Loan requested equitable relief, including:

> (a) A Court determination that the defendant, Tower, has violated the terms of that certain Consent Decree with the Federal Trade Commission, which required the defendant to include credit life and credit disability insurance charges as finance charges on the Truth in Lending Statements furnished to its borrowers who were charged for Credit Life and Credit Disability Insurance.
>
> (b) A Court determination of the rights of plaintiffs and the Class and corresponding rights of defendants.
>
> (c) An order enjoining defendants from engaging in further unfair, misleading and deceptive practices regarding the manner in which it procures and places credit life, credit disability and property insurance on the plaintiffs and Class Members, as well as future borrowers.

(d) A Court Order requiring defendant to refund to plaintiffs and all Class Members all premiums and related charges made to defendant or its agents.

(e) A Court Order requiring the defendant to cease and desist from violating Section 75-67-121 of Mississippi Code by charging premiums not in keeping with that usually and customarily paid for like insurance.

(f) A Court Order requiring the defendant to cease and desist from violating Section 83-5-35 by engaging in Unfair Competition and Practices, by making publishing and disseminating to the public false and misleading statements concerning the availability of loans; the terms of the loans; the costs of said loans, and the collateral to be taken for said loans.

(g) A Court Order requiring the defendants to inform all borrowers of the ownership, financial connection, and sharing of the borrowers' premiums for all insurance charged by the defendant, Tower.

(h) A Court Order requiring the defendants to terminate all "packing" of credit life, credit disability and property insurance unless and until the proposed plan is submitted to and approved by the Court.

(i) A Court Order requiring the defendants to allow property insurance claims to be filed and adjusted without requiring the borrower to obtain an appraisal.

(j) A Court Order establishing a fair method by which the borrowers have the option to file credit insurance claims directly with the insurance company.

The settlement reached by the parties provides primarily injunctive relief. The injunctive relief set forth in the Judgment will change the way Tower Loan does business. The new practices and procedures provide for greater benefit to the Class than the ancillary monetary damage.

"High Dollar" Claims Are Not Released by the Settlement.

Some of the issues presented by the Petitioners simply are not claims which are addressed by the Second Amended Complaint or the language of the Release approved by the Court.

Petitioners claim that they should be allowed to pursue their predatory lending claims against Tower on an individual basis. Basically, Petitioners claim that Tower forced them to buy credit life and credit disability insurance in order to obtain a loan from Tower; and forced them to buy property insurance for items which would have been covered by their homeowner's policy. Petitioners also claim that they were never informed that the purchase of credit insurance was optional. These type cases are commonly referred to "flipping," "packing" and "churning" cases.

Likewise, Class Counsel believes that Tower entered into a pattern, practice, design and scheme to force its borrowers to purchase insurance from an insurance company affiliated with Tower. The percentage of borrowers who purchased credit insurance bears out this belief. One question to be considered is the value of a predatory lending case in Mississippi.

Predatory lending cases are no longer "high dollar" cases in Mississippi.

"Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. . . They do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88, n. 14 (1981) (Citations omitted.) As the course of this litigation has demonstrated, the merits of the case are hotly disputed.

When this case was originally filed, there were few, if any, reported decisions on "flipping," and "packing" cases. Since that time, many cases have been filed, and some decisions have been reported.

In March of 2002, two opinions were rendered by Judge Barbour of the Southern District of Mississippi. Those opinions are *Howard v. Citifinancial*, 195 F. Supp. 2d 811 and *Ross v. Citifinancial*, 2002 WL 461567. In these two opinions, the Court addressed most of the issues raised by Plaintiffs' Complaint.

In the Ross case, Judge Barbour ruled that as a matter of Mississippi law, no fiduciary relationship existed between the individual Defendants and the Plaintiffs. In coming to this conclusion, the Court discussed the cases of *Hopewell Enters., Inc. v. Trustmark National Bank*, 680 So.2d 812 (Miss. 1996); *Hendricks v. James*, 421 So.2d 1031 (Miss. 1982); and *Burley v. Homeowners Warranty Corp.*, 773 F.Supp. 844 (S.D. Miss. 1990).

Judge Barbour also ruled that as a matter of law, the Plaintiffs could not prevail on their claims of breach of the implied duty of good faith and fair dealing. In so holding, he based his opinion, at least in part, on *Burley v. Homeowners Warranty Corp.*, 773 F.Supp. 844.

In finding that the Plaintiffs could not prevail on their civil conspiracy claims, Judge Barbour quoted from the Fifth Circuit ruling in the case of *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (1952), which held:

> [i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Class Representatives herein also advanced a Civil Conspiracy claim. Class Representatives have taken issue with the fact that Tower and American Federated share common ownership. When arguing civil conspiracy, Class Counsel recalls the District Court posing the question with whom Tower was supposed to conspire. This question from the District Court put things in perspective regarding the civil conspiracy claim.

In *Nelson* Judge Barbour further opined that since the Court had already ruled that there was no fiduciary relationship between the Plaintiffs and the Defendants, the Plaintiffs' claim for negligence must also fail, and used as its logic that the failure to act where there is no duty to act is not negligence.

Judge Barbour further discussed the statute of limitations in *Nelson* and held that the general three year statute of limitations was applicable to predatory lending cases. He further ruled that the statute of limitations was not tolled in that the Defendants did not fraudulently conceal facts from the Plaintiffs. He based this holding on the cases of *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416 (Miss. 1987) and *Carter v. Union Security Life Ins. Co.*, 148 F.Supp. 2d 734.

Also in March of 2002, District Judge Tom S. Lee issued an opinion in a case styled *Strong v. First Family Financial Services, Inc.*, 202 F. Supp. 2d 536. In that case, Judge Lee ruled that:

> Loan and insurance documents executed by borrowers, that conspicuously and clearly disclosed that credit insurance was not required as condition of borrowers' loans, precluded any reasonable possibility of recovery by borrowers of their claims against lender based on allegations that lender failed to disclose that credit insurance was not required or that lender misrepresented that such insurance was required as condition to obtaining their loans.

Judge Lee also held:

> Under Mississippi law, a person is under an obligation to read a contract before signing it, and as a general rule will not be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract, regardless of whether he actually read the document.

In February of 2003, Judge Barbour again addressed

"flipping" and "packing" cases in the case of *Johnson v. Citifinancial, Inc.*, 2003 WL 345347. In that case, Judge Barbour reaffirmed the Court's position on the statute of limitations applicable to "flipping" and "packing" cases. He also addressed the issue of an arbitration agreement contained within the lender's contract. Many of the lenders doing business in Mississippi have, since the proliferation of "flipping" and "packing" cases, included arbitration clauses in their standard loan contracts. Tower Loan was one of those lenders (R. 1430).

In addressing the arbitration issue, Judge Barbour ruled that the arbitration clause contained within the lender's contract was not unconscionable and that the claims of the parties whose contracts contained arbitration provisions were subject to arbitration. Petitioners have intimated that, generally, claims submitted to arbitration are much less valuable than cases tried in front of a jury.

Tower Loan began including an arbitration provision in its loan contracts in 1997. Class Counsel is not aware of any Court ruling that the Tower arbitration agreement is unconscionable. Therefore, it must be assumed that any claim an individual might make regarding "flipping" and "packing" resulting from a loan made after 1997 would be subject to arbitration. But for the class action, any claim that any individual might assert as the result of its dealings with Tower Loan prior to 1997 may well be barred by the three year statute of limitations. The settlement of this Class Action will provide relief to over a 103,000 individuals whose claims are likely barred by the statue of limitation or whose claims would be subject to arbitration.

The rulings which have followed the filing of the Complaint in this case have not been favorable to the Plaintiffs. In light of these rulings, Class Counsel is of the opinion that the fact that the class definition in this case encompasses persons whose loans were made in 1993 is an excellent result on behalf of the entire class.

Some of the Claims Asserted by the Objectors Simply Are Not Viable Claims.

Petitioners claim that most class members were overcharged for credit insurance. Notably, Petitioners do not allege that they were charged more for insurance than provided for by the rates filed with the Mississippi Insurance Department. There is a good reason for this, they simply were not. The insurer charged the exact amount approved by the Mississippi Insurance Department. This claim by the Petitioners would fall squarely within the filed rate doctrine. As this Court is well aware, the filed rate doctrine provides that the rates filed with and approved by a regulatory agency of the government are practically unassailable. See *American Bankers Ins. Co. of Fla. v. Wells*, 819 So.2d 1196 (Miss. Dec. 6, 2001). The claims made by the Petitioners relating an "overcharge of insurance premiums" simply are not viable and compensable claims.

The Barnes Complaint which was filed in the Circuit Court of Jefferson County, Mississippi contains examples of claims which simply are not viable against Tower (R. 1435). In ¶ 44 of that Complaint, it is alleged that:

> When the Plaintiffs entered into their contracts with Defendant, Tower, for a consumer loan, they reasonably

> believed that if Defendant, Tower, procured credit life, credit disability and property insurance on their behalf, Defendant would procure adequate insurance at the prevailing market rate.

The maximum rates for credit life and credit disability insurance are codified in Mississippi Code § 83-53-23, and after reviewing hundreds of Tower Loan contracts, Class Counsel has yet to find one instance wherein Tower has charged a rate higher than the one allowed for by the statute. Tower charges the maximum, and the maximum rate is outrageous, but it is the rate allowed by law.

Paragraph 44 of the Barnes Complaint continues:

> Additionally, Plaintiffs reasonably believed and had the right to believe, that if Defendant obtained credit life, credit disability and/or property insurance for them, an exorbitant interest rate would not be charged for the insurance premium.

This is another instance where "it oughta be illegal," but it simply is not. The Mississippi Legislature, in its infinite wisdom, has enacted Mississippi Code § 75-17-21, which allows small loan companies to charge up to 36% in interest on small loans. This is loan sharking accomplished with a piece of paper rather than a leg breaker; it is crime in the suites, not crime in the streets, but it is legal.

The Barnes Complaint further alleges that Tower failed to inform its customers of the excessive nature of the insurance premiums and interest rates.

> It is well settled under Mississippi law that a contracting party is under a legal obligation to read a contract before signing it. *See Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.,* 584 So.2d 1254, 1257 (Miss. 1991).

The Tower contracts are very clear in showing the customer that he/she is being charged for credit insurance and the interest rate applied to the contract (R. 1430). The "failure to inform" claims simply are not seeing the light of day in these cases.

Petitioners have taken the position that some absent class members who defaulted on their loans due to the exorbitant insurance charges had their personal property repossessed and sold. If there are any such Class Members, Counsel for the Petitioners failed to present any evidence of their existence. The lack of evidence to prove this claim was discussed by the Court on pages 61 and 62 of the Court Memorandum Opinion (R.E. 2399, 2400). The District Court stated:

> Release modification is not warranted for wrongful repossession or foreclosure claims. No objector with any such has been specifically identified. Presumably, the claims postulated by counsel are for allegedly unlawful collection practices and do not challenge the lawfulness of credit insurance placement or charges. Consequently, they would not relate to the allegations of the complaint. Release clarification is not necessary, ***for such claims would not be barred by the release as presently drafted.*** (emphasis added)

If, in fact, there are such Class Members, their claims should have been presented to the Court at the Fairness Hearing. The Court cannot be expected to rule in a vacuum. Petitioners presented no proof upon which the Court could rule for them on this issue.

Between sixty and eighty thousand individuals will benefit from the injunctive relief provided.

It is uncontradicted that between sixty and eighty percent of Tower Loan's customers are repeat borrowers. These repeat borrowers will reap the benefits of the injunctive relief to which Tower Loan has agreed. This number is more than sufficient to justify certification under Rule 23(b)(2).

A Rule 23(b)(2) class was rejected by the Fifth Circuit in *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000) because the record revealed only one class member could benefit from injunctive relief. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970 (5th Cir. 2000). By contrast, the Third Circuit recognized that not all class members need benefit from injunctive relief, as long as a substantial proportion benefit as was true here. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 253 (3d Cir. 1975).

In sum, between sixty and eighty percent of the borrowers who do business with Tower Loan will borrow from Tower Loan on more than one occasion. Under the settlement agreement, Tower will be prohibited from engaging in the predatory lending practices at issue in the complaint. Providing this type of injunctive relief to sixty to eighty thousand individuals justifies class-wide injunctive relief under Rule 23(b)(2).

CONCLUSION

The Fifth Circuit correctly held that the district court did not abuse its discretion in certifying this class under Fed.R.Civ.P. 23(b)(1)(A), largely because of the probability of inconsistent adjudications by various courts. Because certification under 23(b)(1)(A) was deemed proper, the Fifth Circuit did not even address the question of whether the alternative certification under Fed.R.Civ.P. 23(b)(2) was an abuse of discretion. The District Courts and Courts of Appeals should be given time to narrow the issues and develop solutions for handling "negative value" cases before they are dealt with by Certiorari. Their work is not complete; they continue to search for the most workable solutions. Certiorari should not be granted in this case.

Respectfully submitted,
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No. 04-488

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In The
Supreme Court of the United States

REBECCA CRYSTIAN, et al.,

Petitioners,

vs.

TOWER LOAN OF MISSISSIPPI, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Petitioners' attempt to present a single abstract question regarding the right of a class member under Federal Rule of Civil Procedure 23(b) or the Due Process Clause to opt out of the class is improper on this record. If the record is properly characterized, Petitioners seek reconsideration of the following issue:

> Where a class has been certified under Rule 23(b)(1)(A) due to plaintiffs' pursuit in competing actions of injunctive relief to restructure defendants' business practices and objecting class members contested the class certification through their own counsel, whether objecting class members' rights under Rule 23 or the Due Process Clause are denied when the district court declines to allow them to opt out of the class based on a factual finding that the class members did *not* possess unliquidated, individualized substantial damages claims.

CORPORATE DISCLOSURE STATEMENT

Tower Loan of Mississippi, Inc., First Tower Loan, Inc., American Federated Insurance Company, and American Federated Life Insurance Company are wholly owned subsidiaries of First Tower Corp. No publicly held corporation owns 10% or more of the stock of First Tower Corp.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Tower Loan of Mississippi, Inc. and First Tower Loan, Inc. (collectively "Tower"), and Respondents American Federated Life Insurance Company and American Federated Insurance Company (collectively "American Federated"), oppose the petition for writ of certiorari. This fact-driven controversy does not present an issue warranting this Court's intervention.

There is no certworthy split of authority among the courts of appeals pertinent to the resolution of this case. That this Court in 1994 and 1997 dismissed writs as improvidently granted on a question of opt-out rights for damages claims is not adequate ground for issuance of a writ here. Decisions of the courts of appeals since 1997 demonstrate there is no material conflict among them concerning certification of a mandatory class under Rule 23(b)(1)(A), or Rule 23(b)(2), where there are no substantial damages claims. Moreover, the Petitioners largely argue in the teeth of the judicially established factual record and beyond issues presented to or addressed by the court of appeals. The specific factual determinations of the district court, which were not disturbed on appeal, and the court of appeals' per curiam affirmance, in which it found any consideration of Rule 23(b)(2) to be unnecessary, render this case a particularly inappropriate vehicle for review of the question Petitioners attempt to present.

STATEMENT OF THE CASE

1. ***The Nature of the Litigation.*** Law and regulation, as well as business necessity, dictate that Tower

and American Federated treat all borrowers the same. Tower utilizes uniform finance charges, the same forms, the same disclosures, and a uniform practice for refunding unearned finance charges throughout its loan business. American Federated charges uniform premiums, refunds unearned premiums in a uniform manner, and utilizes the same approved insurance forms. (9/9/98 Exh. D-5, ¶¶ 6, 7)

This class action is a comprehensive borrower assault on the uniform business practices of Tower and American Federated. Borrowers in this class action proceeding and in numerous competing parallel state-court multi-plaintiff copycat actions seek to conduct a referendum on the small loan industry. They seek a substantial restructuring of the regulated business practices of Tower and American Federated, reimbursement of insurance premiums and other loan charges allegedly unlawfully imposed, and punitive damages predicated on alleged wanton conduct uniformly directed at all borrowers. Virtually all the competing cases demand injunctive and other relief that would subject Tower and American Federated to an impossible array of conflicting standards if the multiple cases were allowed to proceed.

The class action complaint characterizes this class action as "a combination contract, tort and statutory action . . . for restitution, for declaratory, injunctive and equitable relief, and for punitive damages." (9/9/98 Exh. D-1, ¶ 24) As found by the district court, the relief sought by the class is essentially three-fold: (i) The Class demands "declaratory and injunctive relief revamping pursuant to a court-ordered plan the documents, practices, policies and procedures under which credit insurance may be sold, financed and administered." (Mem. Op. (9/9/98) at 6) (ii)

The Class seeks compensatory damages in the form of "restitution through disgorgement by defendants of the finance charges and insurance premiums allegedly unlawfully collected, together with fees and interest." *Id.* (iii) The Class pursues "punitive damages arising out of the alleged unlawful insurance practices uniformly applied to tens of thousands of borrowers." *Id.*

At the time the district court first addressed class certification on the merits, twenty-one other lawsuits were pending against Tower and, in most instances American Federated, in nine separate Mississippi state courts, bankruptcy court and the Hattiesburg Division of the United States District Court for the Southern District of Mississippi. (9/9/98 Exh. D-3(a)-(u)) In multiple actions pending in different Mississippi state courts Tower borrowers situated similarly to the class representative had specifically requested, among other things, "the following equitable relief":

> b. an order enjoining Defendants from engaging in further unfair, misleading and deceptive practices regarding the manner in which it procures and/or provides and places credit life, credit disability and property insurance *on the Plaintiffs and others, as well as future borrowers;*. . . .
>
> g. a Court order requiring the Defendants to terminate all force placement of credit life, credit disability and property insurance *unless and until the proposed plan is submitted to and approved by the Court.*

(9/9/98 Exh. D-3(a), D-3(d) thru 3(i), Count XII) (emphasis added) (*see also* 9/9/98 Exh. D-3(b), D-3(c), Count XII)

Named Petitioner Crystian is among 317 Tower borrowers who purported to join identical claims against Tower and American Federated in a single state court action. ("*Barnes*"; 9/9/98 Exh. D-3(o)) *Barnes* is one of two copycat state court actions filed by former class counsel in *Bryant Jones*[1] on the heels of their abandonment of the *Bryant Jones* settlement. The other complaint filed by former *Bryant Jones* class counsel purported to join the identical claims of 339 Tower borrowers in a different state court. ("*Arbuthnot*"; 9/9/98 Exh. D-3(n)). Other Petitioners are plaintiffs in yet another similar state court action filed later by former *Bryant Jones* class counsel.[2] ("*Alexander*"; 9/9/98 Exh. D-3(l))

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[1] *Bryant Jones* refers to the predecessor identical class action discussed by Petitioners. Petitioners pointlessly refer to remarks made by the district judge in *Bryant Jones* in the context of dismissal of class allegations after class counsel abandoned the class when unable to obtain a desired settlement. The district court here rendered its decision on an extensive record after careful inquiry into all the facts, including the facts exhibited in the history of the *Bryant Jones* case.

[2] Petitioners' declaration that their state-court cases "did not seek class certification" (Pet. 4), while technically accurate due to the absence of "Rule 23 class actions" in Mississippi state court practice, is misleading with regard to the form and practical effect of Petitioners' state-court actions. While technically not class actions, Petitioners' state-court cases also were not *individualized* actions in any meaningful sense. They were all massed multi-plaintiff cases that exploited the liberal joinder and venue rules then in effect in Mississippi to achieve something tantamount to an *unregulated* class action. Indeed, Petitioners' counsel acknowledged when questioned by the district court that their individual cases challenging the defendants' common institutionalized practices would be "lumped" together in state court under the liberal joinder and venue rules mentioned above, because "that's what plaintiffs' lawyers do in the State of Mississippi in state court." (R. Vol. 12 Tr. 287-88)

2. The Original Class Certification and Class Member Challenges. Confronting the multiple borrower challenges of Tower's business practices posed by the class complaint and competing actions, the district court certified the class pursuant to its original order of class certification (R. 189) and supporting memorandum opinion issued on September 9, 1998. (R. 164) The district court first found certification to be warranted under Rule 23(b)(1)(A) based on factual findings that the class complaint and multiple other pending civil actions filed by class members challenged Tower's business practices necessarily uniformly applied and sought considerable injunctive relief which created a risk of inconsistent or varying adjudications that would establish incompatible standards for Tower. Additionally and alternatively, the district court certified the class under Rule 23(b)(2) based on factual findings of the predominance of injunctive relief under the Fifth Circuit's criteria in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). The district court found the demands for monetary relief to be in the nature of an equitable demand for restitution and in any event "incidental" under *Allison* as readily capable of computation based on objective standards without the necessity of individualized hearings.[3] The court formally enjoined any future filings of similar lawsuits and stayed all parallel proceedings by class members. (Pet. 17a-19a)

When the district court certified the class and stayed parallel proceedings, named Petitioner Crystian and many other Petitioners who were state court litigants at the time unsuccessfully sought in the district court relief from the

[3] Additionally in the alternative, the district court certified the class under Rule 23(b)(1)(B).

stay. They then appealed. On July 13, 2000, the court of appeals found that the district court did not abuse its discretion by staying parallel proceedings and declined to exercise jurisdiction over the class certification order. (Pet. 19a)

Following the remand, former class counsel and others, including named Petitioner Crystian and the majority of the other Petitioners, again moved the district court to lift the stay of parallel proceedings. (9/20/01 Exh. D-30) On September 20, 2001, the district court conducted a hearing to allow movants challenging the class certification to submit evidence and oral arguments in support of their challenges. (R. Vol. 13 Tr. 6-7) Counsel for other class members seeking to intervene and address class certification issues appeared. (R. Vol. 13 Tr. 2, 8, 88-97, 104-09) Such counsel were permitted to participate in the hearing and to make additional submissions. (R. Vol. 13 Tr. 146-59) (Pet. 20a)

Indeed, one of the objecting class members' lawyers testified. From the witness stand, the lawyer characterized the objecting class members' claims as just like those of the class representative. He emphasized Tower was for all practical purposes the class members' only source of credit. He complained that Tower continued to prey on his clients and other borrowers. Contrary to Petitioners' characterization of demands for injunctive relief as "boilerplate," the testifying lawyer insisted injunctive relief was necessary to restructure Tower's practices. (R. Vol. 13 Tr. 21-24, 38, 43, 51, 52, 55, 56, 61, 62) (Pet. 20a)

At the September 20, 2001 hearing and thereafter, the district court *sua sponte* raised the issue of continued class

certification under Rule 23(b)(1)(B) in light of this Court's decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). *Ortiz* had been decided after the September 1998 class certification and stay while those rulings were on appeal to the Fifth Circuit. On September 28, 2001, the district court denied the motion for lifting of the stay but explicitly reserved "the right to reconsider this ruling in conjunction with the court's decision on other matters including, *inter alia*, motions to sever, intervene and reconsider class certification." (R. 717) On December 3, 2001, the clerk entered the court's order rescinding the class certification under Rule 23(b)(1)(B) and affirming continued certification under Rules 23(b)(1)(A) and (b)(2). (R. 883)

3. *Settlement Approval Proceedings.* Substantive settlement negotiations for global resolution of this action commenced following the initial remand. (R. Vol. 11 Tr. 65, 92) In conjunction with entry of the court's order preliminarily approving the class action settlement agreement, the court scheduled a fairness hearing for August 27, 2002. Errors occurred, however, in the mailing of the notice of settlement. Consequently, the district court proceeded with the August 27 hearing but recessed it for continuation after issuance of supplemental notice. (R. Vol. 12 Tr. 306-10) Petitioners participated in this hearing through counsel.

Consistent with the supplemental notice, the district court resumed the fairness hearing on December 9, 2002. While some of Petitioners' lawyers who participated in the August 27 hearing elected not to attend this additional hearing, others did attend. At the conclusion of the December 9 hearing, the court invited submission of proposed findings of fact and conclusions of law from all interested persons. Petitioners made such submissions.

Although afforded three opportunities (September 20, 2001, August 27, 2002, and December 9, 2002), *not a single borrower/objector (now Petitioners) testified* to support the contention that this case involves unliquidated, individualized, substantial monetary damages claims. Rather, Petitioners' counsel at the August 27, 2002 fairness hearing described a very small monetary value of the compensatory damages claims as ranging from "maybe a couple of hundred dollars to maybe several thousands of dollars," an obvious reference to the insurance premiums paid. (R. Vol. 12 R. 286) Further, the district court directly asked objectors (today Petitioners) to just "give [him] one example" of an individual claim, which, from a compensatory damages perspective, would justify incurring the expense associated with litigation. (R. Vol. 12 Tr. 287) Petitioners' counsel did not identify any such claim. Instead, Petitioners' counsel asserted the objecting class members' interests would be pursued by "lump[ing]" together their common claims in state court. *See* Pet. 32a.[4]

4. *The District Court's Opinion Approving the Settlement and Maintaining Class Certification.* The district court's opinion approving the settlement addressed at length not only approval of the settlement but also continued certification of the class under Rule 23(b)(1)(A) and Rule 23(b)(2). After thorough exploration of all facets of the proposed settlement under generally accepted criteria for settlement evaluation, the district court found the settlement agreement fair, adequate and

[4] Such Petitioner contentions on the record in this case also belie Petitioners' reliance here on affidavits of other lawyers addressing other lawsuits and substantiate the district court's finding that such affidavits lacked probative value. *See* Pet. 40a, 73a.

reasonable, provided the parties accepted the court's modifications. (Pet. 107a)

The district court addressed the myriad objections to the settlement. The court flatly rejected objector contentions that the injunctive relief was meaningless. (Pet. 70a-71a) The court observed that objectors had "themselves specifically asked five different state courts to craft a court-ordered plan establishing future proceedings for insurance placement." (Pet. 71a) Noting objectors' conclusory contentions "that the Settlement 'dramatically undervalues the absent Class Members' claims,'" the court cited the objectors' failures to offer evidence of defendant wrongful conduct or of their alleged damages. (Pet. 72a) The court acknowledged objectors' citation of state court verdicts in select state court venues but concluded the objectors' mere reference to these verdicts without an evidentiary predicate afforded no basis for legitimate comparison. (Pet. 73a-74a) The court assessed the class representatives' numerous claims, and without reaching their ultimate merits, it found "significant barriers" existed to a favorable judgment. (Pet. 60a)

The district court also confronted the objectors' challenges to class certification. The court referenced its 1998 certification opinion laying out the bases for Rule 23(b)(1)(A) certification and objectors' failure to directly address the court's findings. The court found that the objectors' "boilerplate discussion" of the inapplicability of Rule 23(b)(1)(A) to damages actions lacked "probative value regarding the facts before this court." (Pet. 85a) In the words of the court:

> Plaintiffs' claims, including objectors' claims, cannot be construed at this late date as limited to separate proceedings for damages tied to the

> "same event." . . . The primary issue is not one of whether one jury finds damages to be owed for past conduct and another does not. At stake is how Tower could act prospectively if confronted with conflicting findings, including conflicting court-ordered plans establishing the future policies and practices to be followed. Such overriding questions are what led this court to conclude "this controversy squarely falls under Rule 23(b)(1)(A)."

(Pet. 86a)

As to Rule 23(b)(2) certification, objecting class members (Petitioners) contended that injunctive relief must be the predominant form of relief sought for certification to be appropriate under Rule 23(b)(2), and that under the Fifth Circuit's decision in *Allison* such relief did not predominate here. The district court held that under *Allison* the record established that injunctive relief predominated. The court rejected the objectors' contention that the parties were improperly looking to the settlement agreement rather than the complaint to substantiate the predominance of equitable relief. (Pet. 89a-90a) The court ultimately concluded that its 1998 findings in its original certification opinion continued to withstand scrutiny under the objectors' attacks. The district court held that "the global challenges of institutional practices, the multiple demands for injunctive relief by not only the Class Representatives but also specifically by a number of objectors, and the absence of genuine individualized claims all substantiate the genuineness of injunctive relief." (Pet. 100a)

In rejecting Petitioners' contention that the existence of individualized claims for substantial damages precluded

a finding that demands for injunctive relief predominated, the district court, among other things, found:

> There are no individualized claims for "mental suffering and other consequential damages, and the like." The Class Representatives do not allege any; no objectors substantively suggested any; and no basis exists for judicial speculation regarding any such individualized claims. As previously found by the Court, the Class Members' claims "are not individualized claims under *Allison*," for the damages amounts are "readily capable of computation by following the objective standards of calculating the amounts of insurance premiums charged plus the associated finance costs."

(Pet. 94a-95a)

The district court rejected the Petitioners' contention that mandatory class certification without opt-outs denied class members due process. Petitioners cited *Phillips Petroleum Co. v. Shutts*, 427 U.S. 797 (1985), "for the proposition that 'in class actions seeking to bind plaintiffs with respect to "claims wholly or predominantly for money damages,'" due process requires Class Members be afforded the opportunity to opt out." The district court properly viewed the present Rule 23(b)(1)(A) and (b)(2) class action as markedly different from the *Shutts* damages action under the Kansas version of Federal Rule of Civil Procedure 23(b)(3). Similarly, the district court found the Petitioners' reliance on *Ortiz*, a personal injury action addressing a class consisting of asbestos victims possessed of varying substantial damages claims, to be misplaced. The court also distinguished other cases recognizing opt-out rights for persons possessing unliquidated, individualized,

substantial damages claims. The court again noted "there are no such claims here." (Pet. 104a-106a)

5. ***The Court of Appeals' Per Curiam Opinion.*** On appeal the Petitioners contended that the certification of a non-opt-out class action under Rule 23(b)(2) where damages were the primary relief sought by the class was contrary to Fifth Circuit precedent as established in *Allison*. Petitioners asserted Rule 23(b)(1)(A) does not apply to class actions in which substantial damages are at issue. Petitioners further argued that mandatory class certification violates due process, maintaining that since *Shutts* and *Ortiz*, the circuit courts have regularly upheld the right to opt out whenever substantial money damages are at stake.

The court of appeals affirmed the district court in an unpublished, per curiam opinion. The court readily agreed with the district court that the class complaint and competing numerous claims already otherwise filed demanding injunctive relief to modify Tower's business practices created a risk of inconsistent adjudications. Finding no error in the certification under Rule 23(b)(1)(A), the court of appeals found it unnecessary to "address the alleged error regarding the district court's alternative holding certifying the class under 23(b)(2)." (Pet. 5a) The court held "it [to be] similarly clear that the district court did not abuse its discretion when it approved the parties' settlement." (Pet. 6a)

After addressing the certification under Rule 23(b)(1)(A), the adequacy of the settlement and contentions regarding the district court's not conducting a third fairness hearing, the court of appeals concluded its per curiam opinion as follows:

> In sum, we are convinced that the district court carefully considered all of the pertinent objections

> that were made to the settlement agreement. Indeed, the district court modified the settlement in several respects, including narrowing the release to ensure that certain claims were not barred by the settlement. It is therefore our view that the district court committed no reversible error in its thorough handling of this settlement and we AFFIRM essentially for the reasons given in its able opinion.

(Pet. 7a-8a)

Arguing that the panel's decision directly conflicted with the Fifth Circuit's decision in *Allison*, Petitioners sought rehearing en banc regarding the Rule 23(b)(1)(A) certification. Petitioners argued that in addition to "its flat inconsistency with *Allison*," the panel's decision conflicted with decisions of other circuit courts which do not permit mandatory classes of plaintiffs possessing substantial damages claims. Asserting that the panel "wholly ignored" their due process contentions, Petitioners also sought rehearing regarding alleged opt-out rights.

No member of the panel or in the regular active service of the court of appeals requested that the full court even be polled regarding the petition for en banc rehearing. Consequently, the court of appeals entered its standard per curiam order denying the petition for rehearing en banc.

REASONS FOR DENYING THE WRIT

I. This Case Does Not Present Any Issue Worthy of This Court's Review.

A. Petitioners make much of two prior grants of review, in *Ticor* (1993) and *Adams* (1996). According to

Petitioners, the grants in those cases establish that the question they say is presented here – under what circumstances do damages claims make it inappropriate to certify a non-opt-out class action? – is worthy of this Court's attention. What Petitioners neglect to mention, however, is that, more recently, the Court has repeatedly *denied* petitions presenting that issue.[5] That the Court has done so is not surprising. Whatever may have been true at the time of *Ticor* and *Adams*, there is presently no conflict of authority that would warrant certiorari.

Before the Ninth Circuit's decision in *Ticor*, the courts of appeals were in unanimous agreement that a non-opt-out class action may be appropriate even when the plaintiffs demand not only injunctive and declaratory relief but also damages.[6] That unanimity persists today. Courts agree that certification is appropriate "so long as the

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[5] *See Bratcher v. National Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, 365 F.3d 408 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 277 (2004); *Bratcher v. National Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, No. 04-27, Petition for Writ of Certiorari at 2 (filed July 1, 2004) (raising question of "the appropriate standard for class certification under Fed. R. Civ. P. 23(b)(2), where, as here, the class seek injunctive relief and money damages"); *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Metro-N. Commuter R.R. Co. v. Robinson*, No. 01-908, Petition for Writ of Certiorari at i (filed Dec. 17, 2001) (raising question whether "the standards of class certification set forth in FRCP 23(b)(2) [can] be satisfied in an employment discrimination suit that seeks recovery of individualized relief, including compensatory damages").

[6] *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 124 (1994) (O'Connor, J., dissenting, joined by the Chief Justice and Kennedy, J.) ("The lower courts have consistently held that the presence of monetary damages claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2).").

predominant relief sought is injunctive or declaratory."[7] Although there is some tension among the circuits about exactly "how much" damages claim is "too much,"[8] there is and was broad agreement on the basic premise that certification is permissible when demands for injunctive relief predominate.

The petition in *Ticor* was granted, apparently, to enable the Court to consider whether it should correct a single Ninth Circuit decision that had held that damages claims made certification of a non-opt-out class improper.[9] The Ninth Circuit's decision had been described to the Court as adopting a "blanket requirement of opt-out rights in any case involving monetary claims," contrary to "a long line of circuit court decisions specifically rejecting due process challenges to mandatory class actions . . . involving monetary claims certified under Rule 23(b)(1) and (b)(2)."[10] After dismissal of the writ in *Ticor*, the Court apparently accepted *Adams* for review for a possible reconsideration of that question.[11]

Since *Ticor*, the Ninth Circuit's decision in that case has proven to be considerably less of a watershed event

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[7] *Allison*, 151 F.3d at 411; *see also Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 447 (6th Cir. 2002) (noting "apparent consensus that money damages are recoverable to some extent in a Rule 23(b)(2) class action").

[8] *See infra*.

[9] *See Ticor*, 511 U.S. at 124 (O'Connor, J., dissenting, joined by the Chief Justice and Kennedy, J.) (faulting Ninth Circuit for going beyond dictum in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 n.3 (1985), with potentially "broad-ranging consequences").

[10] *Ticor Title Ins. Co. v. Brown*, No. 92-1988, Petition for Writ of Certiorari, at 12-13 (filed June 15, 1993).

[11] *Adams v. Robertson*, 520 U.S. 83, 92 n.6 (1997) (noting the *Ticor* dismissal and the Court's "continuing interest").

than it was argued to be in 1993. All along, the Ninth Circuit arguably saw an obstacle only in "substantial" damages claims, an approach not in conflict with prevailing "predominance" precedent in other circuits.[12] Moreover, since 1993, the Ninth Circuit has interpreted its *Ticor* precedent to be limited in precisely that way,[13] and has expressly rejected any blanket rule that any claim for money damages always makes a non-opt-out class improper.[14] No other circuit has adopted such a blanket rule.

Petitioners nevertheless claim that there is a conflict of authority by focusing on *Ticor*'s *result*. In *Ticor*, the Ninth Circuit held that damages claims precluded a non-opt-out class, whereas, in the instant case, the Fifth Circuit held that damages claims did not preclude a non-opt-out class. But, as already explained, in *Ticor*, there were *substantial* damages claims.[15] The district court in

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[12] *See Brown v. Ticor Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992).

[13] *See Molski v. Gleich*, 318 F.3d 937, 948 (9th Cir. 2003) ("we have held that certain minimal procedural safeguards, such as notice and the right to opt-out, must be provided to bind absent class members when substantial monetary damages are involved") (citing *Ticor*); *id.* at 950 ("we have held that statutory treble damages can be substantial and, thus, render the action a hybrid suit, in which minimum due process requires the right to opt out") (citing *Ticor*).

[14] *See Molski*, 318 F.3d at 949 ("[W]e have implicitly refuted Appellants' argument for the adoption of a per se rule. In recent cases, we have indicated that certification of a mandatory class may be appropriate even when monetary damages are involved."); *see also Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) (certification appropriate if damages claims "are merely incidental to the litigation"); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1240 n.3 (9th Cir. 1998) ("This court has held that class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages.") (internal quotation marks and brackets omitted).

[15] *See supra*.

this case held that there were no such claims.[16] In an unpublished decision, the Fifth Circuit affirmed. Whether those determinations were correct is utterly bound up with the facts,[17] and subject to deferential review.[18] This Court does not ordinarily review such findings[19] – particularly district court findings not disturbed by the court of appeals[20] in a per curiam affirmance by unpublished opinion.[21]

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[16] *See* Pet. 105a ("These contentions . . . rest on alleged rights of persons possessed of unliquidated, individualized, substantial damages claims. [T]here are no such claims here."); Pet. 17a ("Even if the monetary relief sought by the class were termed nonequitable, (b)(2) certification would nonetheless remain appropriate. Such 'damages' would be 'incidental' under *Allison*."); Pet 92a-93a ("any so called 'damages' are 'incidental' under *Allison*").

[17] *See, e.g.*, *Allison*, 151 F.3d at 416 ("We recognize that, as a matter of degree, whether a given monetary remedy qualifies as incidental damages will not always be a precise determination. . . . The district courts, in the exercise of their discretion, are in the best position to assess whether a monetary remedy is sufficiently incidental to a claim for injunctive or declaratory relief to be appropriate in a (b)(2) class action.").

[18] *See id.* at 418 n.12 ("under the abuse of discretion standard, we are required to defer to the judgments of the district courts as to whether certain monetary relief predominates over injunctive or declaratory relief in any given case").

[19] *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

[20] *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not lightly overturn the concurrent findings of the two lower courts.") (internal quotation marks omitted).

[21] *See Lawrence v. Chater*, 516 U.S. 163, 170 (1996) ("while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance

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B. If there is tension among the circuits at all, it is about the issue of precisely "how much" damages claim is "too much." Although all circuits agree that the inquiry under Rule 23(b)(2) should turn on whether damages are the "predominant form of relief sought by the class,"[22] courts have differed in their precise "formulation" of the "predomination requirement."[23] But, assuming that there truly is discord among the circuits, Petitioners cannot profit from it.

In its *Allison* decision (which Petitioners correctly describe as the "leading" case),[24] the Fifth Circuit settled on a standard under which the assertion of damages claims renders a case unsuitable for a mandatory class action unless those damages claims are purely "incidental to requested injunctive or declaratory relief."[25] Under this test, damages claims do not stand in the way of a non-opt-out class when they "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[26] When that is true, certification is particularly appropriate – damages do not depend "on the intangible, subjective differences of each class member's circumstances," and do not "entail complex individualized determinations."[27] The *Allison* approach

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that we generally look for in deciding whether to exercise our discretion to grant plenary review").

[22] *Molski*, 318 F.3d at 949.

[23] *Allison*, 151 F.3d at 411.

[24] Pet. 17.

[25] *Allison*, 151 F.3d at 415.

[26] *Id.*

[27] *Id.*

has been adopted by a majority of the Circuits.[28] Contrary to Petitioners' suggestion, the Seventh Circuit is firmly part of that majority.[29]

Admittedly, the Second and Ninth Circuits have rejected *Allison*.[30] These courts have adopted a standard under which "predominance" is determined not through any "bright-line test," but on the basis of all "the specific facts and circumstances of each case."[31] Expressing concern for district court discretion and the certification of civil rights actions, the Ninth Circuit has made clear that, under this "ad hoc balancing" approach, class actions may be certified even if they would not pass muster under the *Allison*

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[28] *See, e.g., Barabin v. Aramark Corp.*, No. 02-8057, 2003 WL 355417, at *1 (3d Cir. Jan. 24, 2003) ("a court may only certify a class if the damages claim is incidental to the primary claim for injunctive or declaratory relief"); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (same).

[29] *See Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000) ("we adopted the Fifth Circuit's reasoning on this point from *Allison*"); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) ("we agree with the Fifth Circuit's principal holding in *Allison*").

[30] *See Molski*, 318 F.3d at 949 ("we refuse to adopt the approach set forth in *Allison*"); *Robinson*, 267 F.3d at 164 ("we . . . decline to adopt the incidental damages approach set out by the Fifth Circuit in *Allison*").

[31] *Molski*, 318 F.3d at 950; *see Robinson*, 267 F.3d at 164 ("a district court must consider the evidence presented at a class certification hearing and the arguments of counsel, and then assess whether (b)(2) certification is appropriate in light of the relative importance of the remedies sought, given all of the facts and circumstances of the case") (internal quotation marks and brackets omitted); *id.* ("the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case").

test.[32] Likewise, the Second Circuit has described the *Allison* test as being "unduly stringent."[33]

One might well ask whether the difference in wording amounts to a conflict of authority, or whether it reflects merely different formulations leading to largely similar results.[34] However that may be, if Petitioners (who oppose non-opt-out class certification) cannot prevail under the Fifth Circuit's exacting test, they certainly cannot prevail under the test of the Second and Ninth Circuits, which allows non-opt-out classes more liberally. Thus, any disagreement between the *Allison* courts on the one hand and the Second and Ninth Circuits on the other is not implicated here.[35]

C. Because Petitioners lose under the settled approach of *all* circuits, the only question that Petitioners could seek to present is whether this Court should consider rejecting that approach – by holding that even the slightest claim for damages makes a case entirely unsuitable for

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[32] *See Molski*, 318 F.3d at 950 ("[A]doption of a bright-line rule distinguishing between incidental and nonincidental damages for the purposes of determining predominance would nullify the discretion vested in the district courts through Rule 23. . . . In addition, such a bright-line rule holds troubling implications for the viability of future civil rights actions . . . .").

[33] *Robinson*, 267 F.3d at 162.

[34] *Cf. Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

[35] *Cf. Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, Circuit Justice) ("Given the significant nature of the issue and the acknowledged disagreement among the lower courts, the Court, in my view, should examine and resolve the question in an appropriate case. This, however, is not an appropriate case. [¶] Applicant is unlikely to prevail in his request for a stay under either of the standards adopted by the Courts of Appeals.").

non-opt-out treatment. It is questionable whether Petitioners are entitled to present this question. Petitioners never urged the court of appeals to re-evaluate the *Allison* standard.[36] In any event, evaluating that standard would be a poor use of this Court's time, for two reasons.

First, there is no reason whatsoever to believe that the currently prevailing *Allison* approach is wrong. Judge Jolly's *Allison* opinion took its cue from the Advisory Committee Notes to Rule 23,[37] and reflected a careful analysis of the "balance struck in each case between the need and efficiency of a class action and the interests of class members to pursue their claims separately or not at all."[38] In addition, *Allison* is entirely consistent with the *dictum* that this Court uttered in *Shutts*, which identified due process concerns only in connection with "claims wholly or predominantly for money judgments," not in connection with "other types of class actions, such as those seeking equitable relief."[39] Likewise, the *Allison* test is congruent with *Ortiz*. Although the Court there repeated the *Shutts* dictum,[40] it stopped well short of suggesting that even a peppercorn of damages precludes a

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[36] *Cf. Bratcher v. National Standard Life Ins. Co.* (*In re Monumental Life Ins. Co.*), No. 04-27, Brief in Opposition Petition for Writ of Certiorari at 4 (filed Aug. 9, 2004) ("All parties accepted *Allison* as the applicable standard. . . .").

[37] *See* Advisory Committee Notes to Rule 23, 39 F.R.D. 98, 102 (1966) (Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages"); *Allison*, 151 F.3d at 411 ("This commentary implies that the drafters of Rule 23 believed that at least some form or amount of monetary relief would be permissible in a (b)(2) class action.").

[38] *Id.* at 412.

[39] *Shutts*, 472 U.S. at 811 n.3.

[40] *See Ortiz*, 527 U.S. at 847-48.

non-opt-out class.[41] And to the extent that courts have criticized *Allison*'s approach to non-opt-out certification at all, it is for being too exacting – not for being too liberal.[42]

Second, if, as Petitioners imply, this Court meant to use *Ticor* and *Adams* to raise the bar for non-opt-out certification,[43] Petitioners are wrong in painting those cases as having failed to accomplish the Court's mission. The courts of appeals have read the dismissal orders in those cases, along with the language in *Ortiz*, as delivering warnings about the dangers of mandatory class actions.[44] Unless the Court is actively considering adopting a *per se* rule, there is no good reason to believe that it can materially improve upon the "predominance" jurisprudence that has been developed – to increasingly exacting effect – by all courts of appeals uniformly. There simply is no cause to revisit this area, particularly so soon after *Ortiz*.

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[41] *See Molski*, 318 F.3d at 948 ("we disagree that *Ortiz* requires adoption of this per se rule").

[42] *See supra*.

[43] *But see Ticor*, 511 U.S. at 125 (O'Connor, J., dissenting, joined by the Chief Justice and Kennedy, J.) (noting that Ninth Circuit's decision may have gone beyond dictum in *Shutts*, 472 U.S. at 811 n.3, with potentially "broad-ranging consequences").

[44] *See, e.g.*, *Molski*, 318 F.3d at 948 ("we recognize the Court's growing concerns regarding the certification of mandatory classes when monetary damages are involved"); *Jefferson*, 195 F.3d at 899 ("*Ortiz* . . . says in no uncertain terms that class members' rights to notice and an opportunity to opt out should be preserved whenever possible").

II. This Case Is a Poor Vehicle to Evaluate the Circumstances Under Which District Courts May Certify Non-Opt-Out Class Actions.

Even if this Court were inclined to re-evaluate the standards under which district courts may certify non-opt-out class actions, this case would not provide a suitable vehicle for that purpose – for four reasons.

First, this case hails from the Fifth Circuit, which – as explained above – applies the exacting "purely incidental" test. If the Court were at all interested in re-evaluating the circumstances under which district courts may certify non-opt-out class actions, it should do so in a case from the Second or Ninth Circuits, which apply the less exacting "ad hoc balancing" test. That way, the Court would have all three possibilities before it: (1) ad hoc balancing (adopted by the Second and Ninth Circuits), (2) the "purely incidental" test (adopted by all other circuits); and (3) *per se* prohibition (to date adopted by no court). If the Court were to grant review in this case and find the *Allison* test to be constitutionally permissible, the constitutionality of the "ad hoc balancing" test would remain in doubt. That may well be why the Court denied certiorari in *Bratcher*, another case from the Fifth Circuit.

Second, published cases indicate that the vast majority of non-opt-out class actions are certified under Fed. R. Civ. P. Rule 23(b)(2). In contrast, the court of appeals in this case relied only on Rule 23(b)(1)(A). Class actions under the latter rule may present special considerations. For example, Petitioners themselves assert that the circuits are split on the question whether the well-developed standards that courts have adopted with respect to (b)(2) actions also apply with respect to comparatively rarer (b)(1) actions. Although that particular assertion

appears unfounded as Petitioners point only to the decision below as being out of step,[45] it underscores that the Court should not grant review in a case that may turn on the eccentricities of a rarely invoked rule.

Third, even if – as Petitioners claim – certification of a non-opt-out-class could in theory violate due process, the unusual procedural background of this case makes it unlikely that a violation occurred here. In the district court, Petitioners received much more "process" than the usual non-opt-out class member. Although notice is not required in a non-opt-out class, the district court required that all class members be given individual notice by mail.[46] Interested parties were given ample opportunity to submit briefs and participate at hearings.[47] Petitioners appeared and participated through their own lawyers.[48] Because due process ordinarily requires no more than notice and an opportunity to be heard,[49] Petitioners likely received – or could have received – all the "process" that was "due."[50]

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[45] The decision below is unpublished and therefore cannot establish the law of the circuit. Moreover, the court's opinion nowhere states that (b)(1) class actions need not meet the predominance test. To the contrary, the court expressly cited *Allison*. *See* Pet. 3a.

[46] *See* Pet. 24a-26a, 33a-35a.

[47] *See* Pet. 32a ("All counsel were afforded liberal opportunities to be heard.").

[48] *See* Pet. ii, 7.

[49] *See, e.g.*, *Shutts*, 472 U.S. at 812 ("The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.").

[50] *See* Pet. 106a; *see also Eubanks v. Billington*, 110 F.3d 87, 96 n.15 (D.C. Cir. 1997); *Kincade v. General Tire and Rubber Co.*, 635 F.2d 501, 507-08 (5th Cir. 1981); *cf. Bratcher*, 365 F.3d at 417 & n.13; *Grimes v. Vitalink Communication Co.*, 17 F.3d 1553 (3rd Cir. 1994), *cert. denied*, 513 U.S. 986 (1994).

The possibility of this alternative ground for affirmance renders this case a poor vehicle.[51]

Finally, the issue that Petitioners seek to present – under what circumstances does a plaintiff have a right to litigate individually? – is not truly implicated in this case. Petitioners do not desire to proceed in individual actions.[52] Indeed, in the district court, some of the objectors were represented by counsel who had originally filed a non-opt-out class action of his own.[53] Currently, Petitioners desire to proceed by way of massed, multi-plaintiff state court cases that are tantamount to unregulated class actions.[54] This dispute is not about whether plaintiffs are being denied an individual opportunity to be heard and consequently is not an appropriate case in which to debate the suitability of class certification.

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[51] *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, and Kenneth S. Geller, *Supreme Court Practice* 457 (8th ed. 2002) ("[T]here may be other legal grounds for affirmance that demonstrate that the decision below is correct regardless of how the Court resolves the question presented, such that the Court would not likely reach the question and the decision would be robbed of any practical significance.").

[52] *See* Pet. 30a ("No objector maintains this controversy should not have been certified as a class action proceeding."); (Pet. 83a) ("Objectors do not contend this proceeding should not be certified as a class action under Rule 23."). Indeed, in the district court, some of the objectors were represented by counsel who had originally filed a non-opt-out class action of his own. *See* Pet. 10a-13a, 101a-102a

[53] *See* Pet. 10a-13a, 101a-102a.

[54] *See* Pet. 11a-12a, 31a-32a.

CONCLUSION

The petition for writ of certiorari should be denied.

December 13, 2004.

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DEC 2 8 2004

NO. 04-488

IN THE

Supreme Court of the United States

REBECCA CRYSTIAN, et al.,

Petitioners,

v.

TOWER LOAN OF MISSISSIPPI INC, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

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December 28, 2004

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INTRODUCTION

Respondents essentially concede that this case implicates a circuit split on an important issue on which this Court has twice granted certiorari. Opp. 15, 18. However, respondents misunderstand the nature, scope, and importance of the split, leading them to misapprehend the petition's focus. They believe the petition concerns the circuit split over the standards for certifying a class under various subdivisions of Rule 23 rather than the circuit split over opt-out rights. That misapprehension leads respondents to claim erroneously that this Court has previously denied certiorari on the question presented. *See* Opp. 14 & n.5. In fact, respondents identify denied petitions that challenged the propriety of class certification under Rule 23(b), but cannot cite any denied petition that concerned the grant or denial of opt-out rights for absent class members seeking substantial damages. Respondents' conflation of the two questions also renders most of their opposition brief beside the point. In the pages that follow, petitioners first explain why respondents' confusion should not divert this Court's attention from the question presented. Then, petitioners reply to respondents' specific arguments.[1]

ARGUMENT

1. Respondents essentially concede that the courts of appeals disagree on "'how much' damages claim is 'too much'"

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[1]All citations to "Opp." are to the Brief in Opposition filed by defendants Tower Loan of Mississippi Inc., *et al.* The opposition filed by the class plaintiffs does not seriously address the legal issues presented in the petition. Rather, it primarily seeks to establish that the plaintiffs' claims are weak. Although petitioners believe that they will prevail on their individual state-law damages claims if they are allowed to opt out, the merit of those claims is wholly irrelevant to the question whether petitioners have a right to opt out to pursue them.

to permit certification without opt-out rights. Opp. 15, 18. But respondents suggest that there is only one answer to that question—that opt-out rights may be denied whenever injunctive claims "predominate" over monetary claims—and that the courts only disagree over the definition of "predominance." Opp. 18-20. Respondents are mistaken. At least two circuits hold that even when injunctive relief predominates over monetary relief, claimants seeking damages must be permitted to opt out.[2] Thus, these courts hold that a substantial damages claim is "too much" to permit the denial of opt-out rights regardless of the relationship between monetary and injunctive relief sought in the action.

In particular, the Ninth Circuit held in *Ticor* and reaffirmed in *Molski* that absent class members seeking "substantial" damages must be permitted to opt out regardless of the presence (or even predominance) of claims for injunctive relief. *See Ticor*, 982 F.2d at 392; *Molski*, 318 F.3d at 950-51. And this Court noted in dismissing the writ in *Ticor* that Rule 23(b) or the Due Process Clause may prohibit *any* certification of damages claims without opt-out rights. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 120-21 (1994) (per curiam). Similarly, the Seventh Circuit held in *Jefferson* that absent class members should be granted opt-out rights when they claim *any* damages or, indeed, "whenever possible." 195 F.3d at 899. In stark contrast, the Third, Fourth, Sixth, and Eighth Circuits have held that opt-out rights should be denied whenever possible,

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[2] *See Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985)); *Molski v. Geleich*, 318 F.3d 937, 950-51 (9th Cir. 2003); *Jefferson v. Ingersoll Int'l Corp.*, 195 F.3d 894, 897-99 (7th Cir. 1999) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999)).

including when absent class members seek monetary damages.[3] *See* Pet. 12-13.

Thus, respondents are wrong to imply that all courts allow certification of non-opt-out classes whenever injunctive claims "predominate" over monetary claims. Opp. 14-16. It is true that all courts permit certification of damages claims into *nominally* mandatory classes (meaning classes certified under Rule 23(b)(1) or (b)(2)) in some circumstances, although they disagree about what those circumstances are. But the Ninth and Seventh Circuits—and, at least sometimes, if not always, the Second, Eleventh, and D.C. Circuits[4]—require opt-out rights for damages claims even if they are certified under (b)(1) or (b)(2). Other courts, like the Fifth Circuit below, do not.

2. Respondents' mistake is to conflate two distinct questions: (1) whether Rule 23 or the Due Process Clause requires an opt-out right for absent class members seeking substantial damages; and (2) how to determine which subdivision of Rule 23(b) applies to class actions seeking both monetary and injunctive relief. As suggested by this Court in *Ticor*, 511 U.S. at 121, one potential answer would resolve both questions: A holding that claims for money damages may be certified only under Rule 23(b)(3), which provides opt-out rights. Absent such a holding, the two questions remain distinct. For example, even if this Court were to hold that

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[3] *See Kyriazi v. W. Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919-20 (6th Cir. 1989); *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1175 (8th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996).

[4] *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 166-68 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983); *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997).

damages claimants have an absolute right to opt out, the lower courts could continue to certify classes seeking both injunctive and monetary relief under any subdivision of Rule 23(b). They would simply be required to provide opt-out rights for damages claims included within properly certified (b)(1) and (b)(2) classes.[5]

As a result of their confusion, respondents focus almost exclusively on the circuit split over certification and ignore the fundamental question that the petition presents, thereby rendering most of their opposition brief irrelevant. For example, respondents argue that this case presents no conflict in authority because the circuits that disagree with the predominance test announced in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), certify (b)(1) and (b)(2) classes more liberally than the Fifth Circuit does. Therefore, respondents claim, *any* circuit would have certified this class. Opp. 20. However, by focusing on the propriety of class certification rather than the question of opt-out rights, respondents miss the crucial point of the petition: Even if every circuit would have certified the class below under a nominally mandatory subdivision of Rule 23(b), the Seventh and the Ninth Circuits, and perhaps others, *see supra* note 4, would have provided opt-out rights with respect to the damages claims.

3. Respondents' confusion is also the basis for their assertion that this Court has denied certiorari on the question

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[5]The decision whether to certify a class under Rule 23(b)(3) or one of the other subdivisions of Rule 23(b) is significant independent of the question of opt-out rights because it also controls whether the putative class must meet the additional "predominance" and "numerosity" requirements imposed by Rule 23(b)(3).

presented.[6] It has not. The Court denied certiorari in the cases that respondents identify, but those cases presented only the certification question, not the opt-out question.

In *Monumental Life*, the petitioners sought reversal of a Rule 23(b)(2) class certification. *See Bratcher v. Nat'l Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, No. 04-27 (filed July 1, 2004). The court of appeals had affirmed the certification and had specifically instructed the district court to consider granting opt-out rights on remand. *Monumental Life*, 365 F.3d at 417. The defendants-appellants petitioned for certiorari because they wished to defeat class certification altogether—not because they wished to bind class members to a non-opt-out settlement that released money damages claims, as respondents do here. And the plaintiffs-respondents merely wanted to preserve the class certification. Neither party argued that the court of appeals erred in instructing the district court to consider permitting class members to opt out. Opt-out rights were not at issue.

In *Robinson*, the petitioner sought reversal of a decision that vacated a denial of class certification. *See Robinson v. Metro-North Commuter R.R. Co.*, No. 01-908 (filed Dec. 17, 2001). The Second Circuit had developed a test under which (b)(2) certification would likely be granted upon remand and, like the court in *Monumental Life*, it had suggested that opt-out rights might be appropriate. *Robinson*, 267 F.3d at 166-67. Again, one side favored certification, the other opposed it, and neither was concerned with opt-out rights.

In contrast to its denials of petitions that presented only the

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[6]*See* Opp. 14 & n.5 (citing *Bratcher v. Nat'l Standard Life Ins. Co. (In re Monumental Life Ins. Co.)*, 365 F.3d 408 (5th Cir.), *cert. denied*, 125 S. Ct. 277 (2004); *Robinson*, 267 F.3d 147. (2d Cir. 2001), *cert. denied*, 525 U.S. 951 (2002)).

certification question, this Court has twice granted certiorari when presented with the opt-out question. *See Ticor*, 511 U.S. 117; *Adams v. Robertson*, 520 U.S. 83 (1997). And in *Adams*, the Court specifically noted its "continuing interest" in the question. 520 U.S. at 92 n.6.

4. Thus, the only inquiry relevant to determining whether this case properly presents the circuit split initiated more than ten years ago by *Ticor* is whether the petitioners seek "substantial" damages. Despite respondents' emphasis on injunctive relief, the class members indeed seek substantial damages.

Respondents imply that petitioners were unable to produce an example of an objector who could claim unliquidated, individualized, substantial monetary damages. Opp. 8. Petitioners could hardly be expected (let alone required) to produce such an example given that the burden of justifying a certification and settlement is on its proponents, *see generally Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and that there had been no discovery or factual development as a result of the district court's 1998 injunction against all pending (and future) state-court actions shortly after some were filed. R. 191. But, in any event, objectors' counsel explained that many of his clients had individualized claims worth thousands of dollars. R. vol. XI 285-89. And substantial evidence in the record, coupled with class counsel's own concessions, easily demonstrates that petitioners possess substantial damages claims that were abrogated by the non-opt-out class certification below. To reiterate:

- The class complaint overwhelmingly requests monetary relief. R. 513-14.
- The settlement releases all claims for damages, *i.e.*, under the now-approved settlement, petitioners have no right to pursue their individual damages

claims. R. 986-87.

- The settlement pays what it specifically terms "compensatory damages" and "punitive damages." R. 979-80.
- Class counsel conceded that 1,000-1,500 class members would likely win substantial damages if permitted to pursue state-court actions. R. vol. XI 37-38, 46-47.
- All prior settlements and verdicts in similar cases *exclusively* involved damages, and some involved tens of thousands of dollars in individualized monetary relief. R. 1095, 1748-52, 1800-01, 2008.
- Class counsel conceded that attempting to provide compensatory relief in the class settlement on a claim-by-claim basis was "unworkable," R. vol. XI 47, and a "morass," *id.* at 46-47, because class members' claims differed greatly from one another. *Id.*

See generally Pet. 3-7. Although respondents make conclusory assertions about the predominance of injunctive relief, *see* Opp. 16-17, they do not contest these basic facts establishing that many class members hold claims for substantial money damages.[7]

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[7]Citing the testimony of one lawyer for some of the objectors, respondents also argue that objecting class members believed injunctive relief was important. Opp. 6. That argument is irrelevant for two reasons. First, regardless of the significance of injunctive relief to *some* class members, it is undisputed that at least 44% of class members would not benefit from the settlement's injunctive relief at all because they would not be repeat borrowers during the limited, five-year period of quasi-injunctive relief provided by the settlement. R. 959, 980 n.4; R. vol. XI 149-51. In other words, for a large proportion of the class, damages are the *only* potential relief. More important, the significance of injunctive relief is irrelevant to the question whether the objectors had a right to opt out with

(continued...)

5. Finally, respondents' argument that this case is a poor vehicle for deciding the question presented is unconvincing. *See* Opp. 23-25. First, respondents' attempt to distinguish this case because it was decided under Rule 23(b)(1)(A) fails. Several courts, including this Court, have noted that the same opt-out concerns apply to *any* mandatory class, regardless of whether it is certified under Rule 23(b)(1) or (b)(2). *See Molski*, 318 F.3d at 949 n.13; *Ticor*, 511 U.S. at 121. As discussed above, the question whether opt-out rights can be denied to class members who possess substantial damages claims exists regardless of whether the case can be certified under one or more "mandatory" categories of Rule 23.

Second, respondents' curious assertion that this Court should grant certiorari in a case from the Second or Ninth Circuit rather than the Fifth, Opp. 23, only undermines its opposition to this petition. Respondents are, of course, wrong to suggest that a petition's "cert-worthiness" depends on the circuit from which it arrives. And, ironically, in making the argument, respondents concede the existence of division among the courts of appeals.

Third, respondents argue that petitioners here have already received individual notice and an opportunity to participate, which is more process than is required for mandatory classes under Rule 23. Opp. 24-25. The argument begs the question whether mandatory class certification is an appropriate baseline for people who seek substantial damages. Under *Shutts*, due process requires more than notice and the opportunity to be heard; it also requires providing class members with damages

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[7](...continued)
respect to their substantial damages claims. Petitioners do not argue that they have a right to opt out of the injunctive portion of a properly certified (b)(1) or (b)(2) action; they argue only that they have a right to opt out with respect to their damages claims.

claims an opportunity to exclude themselves from a class action. *See* 472 U.S. at 811-12.

Fourth, respondents argue that petitioners here do not deserve opt-out rights because they do not intend to pursue their claims individually, as evidenced by the fact that they joined with other plaintiffs when they sued in Mississippi state court. The assertion is both untrue and irrelevant. It is untrue because many of the petitioners have yet to file suit (as the district court enjoined them from doing so in 1998, R.191) but intend to sue individually. *See, e.g.,* Dist. Ct. Docket Entry No. 239 (Notice of Appeal of Randolph Sullivan, *et al.*, 79 petitioner-class members who have not filed suit). It is irrelevant because the point is not whether plaintiffs choose to litigate individually or collectively; it is whether they are given the choice to litigate outside a class action so that they, and not class counsel, exercise control over their claims.

Plaintiffs who join together voluntarily, even in large groups, retain their own counsel and, most important, control the fate of their own individual claims. This Court extolled the value of individual control in *Shutts* and *Ortiz* when upholding damages claimants' due process rights to opt out. And the Court should uphold that value here. In doing so, the Court will resolve an important and longstanding conflict among the circuits that, despite two prior attempts, it has previously been unable to resolve.

CONCLUSION

The petition for a writ of certiorari should be granted.

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